IN THE 1

Supreme Court of the United States.

IN THE MATTER

OF

THE Application of THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK for a Writ of Prohibition or Mandamus against the Honorable HENRY G. WARD, Circuit Judge of the United States for the Second Circuit, and against THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK. 2

Now comes the petitioner, Metropolitan Trust Company of the City of New York, by Henry B. Closson, its attorney, and moves for leave to file the petition for a writ of mandamus hereto annexed; and further moves that an order be entered and issued, directing the Honorable 3
Henry G. Ward, Circuit Judge of the United States for the Second Circuit and for the Southern District of New York, and directing the Circuit Court of the United States for the Southern District of New York, to show cause why a Writ of Prohibition or

Mandamus should not issue against them and each of them in accordance with the prayer of said petition, and why said petitioner should not have such other and further relief in the premises as may be just and meet.

HENRY B. CLOSSON,
Attorney for Petitioner, Metropolitan Trust Company of the City of New York.

TO THE HONORABLE MELVILLE W. FULLER, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Metropolitan Trust Company of the City of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, respectfully shows:

FIRST.—That on or about January 15, 1907, one James Pollitz commenced a suit of a civil nature in equity in the Supreme Court of the State of New York, in the County of New York, in which suit said Pollitz, a citizen and resident of New York State, was plaintiff and the following, in addition to your petitioner, were defendants: The Wabash Railroad Company, a corporation organized under the laws of Ohio, Mercantile Trust Company, The United States Mortgage and Trust Company, the Bowling Green Trust Company, Edgar T. Welles, Robert C. Clowry, Winslow S. Pierce, Robert M. Gallaway, Thomas H. Hubbard, John T. Terry, John C. Otteson, Henry Evans, Henry K. Pomroy, George M. Cumming, George J. Gould, James B. Forgan, J. C. Van Blarcom, Frederic A. Delano, Joseph J. Slocum and Edward T. Jeffery. That summons was served in said suit

upon the defendants The Wabash Railroad Company, Jeffery, Otteson, Pierce, Mercantile Trust Company, United States Mortgage and Trust Company, Evans, Pomroy, Cumming, Bowling Green Trust Company and your petitioner, but none of the other defendants was served or has appeared in the action. A copy of the summons and bill of complaint in said suit is hereto annexed, marked "Exhibit A." 7

SECOND.—That on or about the 25th day of January, 1907, the defendant The Wabash Railroad Company duly filed in the office of the Clerk of the said Supreme Court of the State of New York for the County of New York a proper petition and bond praying for the removal of said suit to the Circuit Court of the United States for the Southern District of New York on the ground that a separable controversy existed therein between the plaintiff, a resident and citizen of the State of New York, and said defendant, The Wabash Railroad Company, a corporation formed and existing under the laws of Ohio, and thereafter a duly certified transcript of the record of said suit was duly filed in the office of the Clerk of the Circuit Court of the United States for the Southern District of New York. 8

THIRD.—That on or about the 15th day of February, 1907, the plaintiff duly moved at a stated term of the Circuit Court of the United States for the Southern District of New York for an order remanding said cause to the said state court. That said motion was brought on for argument before and was heard by the Honorable E. Henry Lacombe, Circuit Judge of the United States duly appointed in and for the Second Circuit, and subsequently and on or about the 18th day of February, 1907, said Circuit Judge handed down an opinion stating that the said motion to remand was denied, and thereafter and on or about the 21st day of February, 1907, an order was signed by said Circuit Judge and duly filed in 9

10 the Clerk's office of said United States Circuit Court denying said motion to remand said suit to the New York Supreme Court. A copy of said order denying said motion to remand is hereto annexed, marked "Exhibit B."

FOURTH.—That thereafter the plaintiff in said action, the said James Pollitz, applied to this Court for a writ of mandamus directed to the Honorable E. Henry Lacombe, Circuit Judge of the United States for the Second Circuit and for the Southern District of New York, and to the Circuit Court of the United States for the Southern District of New York, to compel said Judge and Court to remand
11 said suit to the Supreme Court of the State of New York. That an order was entered by this Court on or about the 25th day of March, 1907, requiring said Circuit Judge and said Circuit Court to show cause why the prayer of the petition filed by said Pollitz should not be granted. That thereafter and on or about the 7th day of April, 1907, said Judge and Court made due return to said order, setting forth that the order denying the plaintiff's motion to remand said cause to the State Court was made in the exercise of the jurisdiction and judicial discretion conferred upon the Circuit Court by law and for reasons stated in an opinion filed with the order. That on due consideration, the said rule was dis-
12 charged and the petition for a mandamus dismissed on the ground that the question whether or not a separable controversy existed between the plaintiff and The Wabash Railroad Company, such as was averred in the petition for removal, was a question which had been judicially determined by the Circuit Judge, which determination, if erroneous, could be reviewed after final judgment by writ of error or appeal (*In re* Pollitz, 206 U. S., 323).

FIFTH.—That after the removal of said cause into the Circuit Court of the United States for the Southern District of New York all of the defendants who

had been served with summons or had appeared in 13
the action, including your petitioner, interposed demurrers to the bill of complaint, the demurrer interposed by your petitioner being a general demurrer and setting forth in substance that the complaint set forth no cause of action against your petitioner and was without equity. A copy of the demurrer of your petitioner so interposed is hereto annexed, marked "Exhibit C."

SIXTH.—That after the entry of said order of Hon. E. Henry Lacombe denying the motion to remand the cause, said demurrers were duly brought on for argument before and were heard by the Honorable John R. Hazel, District Judge of the United 14
States, sitting in the Circuit Court for the Southern District of New York, and subsequently said Judge handed down an opinion stating that the demurrers of defendants other than your petitioner would be overruled, but that the demurrer of your petitioner would be sustained. That thereafter and on or about the 10th day of January, 1908, a final decree was entered sustaining the demurrer of your petitioner and dismissing the bill finally as to it without leave to the plaintiff to amend his bill. A copy of the final decree so entered dismissing the complaint as against your petitioner is hereto annexed, marked "Exhibit D."

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SEVENTH.—That thereafter all of the defendants whose demurrers had been overruled—that is, all of the defendants who had been served with process or had appeared, except the defendant the Metropolitan Trust Company of the City of New York, filed answers to the complaint, and replications were subsequently filed by the plaintiff, testimony was taken and returned, and the cause was brought on before the Honorable George W. Ray for final hearing. That subsequently said Judge handed down an opinion stating that said suit, together with a similar suit with which it had been consolidated, but to which

16 your petitioner had never been a party, would be dismissed on the merits. That thereafter and on or about the 23rd day of February, 1909, a final decree was, in accordance with said opinion, entered, dismissing said suit upon the merits as to all the said defendants, except your petitioner. A copy of said decree is hereto annexed, marked "Exhibit E"

EIGHTH.—That thereafter and on or about the 12th day of March, 1909, the plaintiff filed a petition for leave to appeal from said final decree entered on the 23rd day of February, 1909, and the judgment thereon entered on the 5th day of March, 1909, dismissing the complaint in said action as against the defendants,
17 other than your petitioner, who had appeared in the case, but the plaintiff did not appeal from said final decree of January 10, 1908, dismissing said bill of complaint as against your petitioner, and thereupon and on the same day an appeal, as prayed in the petition of the plaintiff, was allowed. That neither the demurrer of your petitioner nor the said decree of January 10, 1908, dismissing said complaint as as against your petitioner, was included in the record on appeal. That no bond was given to your petitioner upon said appeal. That no citation to your petitioner was issued upon said appeal, nor was any notice thereof given to your petitioner; nor was service of any paper relating to said
18 appeal made upon your petitioner or its solicitors, and your petitioner was in no way a party to said appeal. That after the allowance of said appeal the plaintiff filed his assignment of errors in which he assigned as an error relied on to reverse said final decree of the 23rd day of February, 1909, the order of Circuit Judge Lacombe denying the motion of the plaintiff to remand said cause to the State Court. That thereafter said appeal was brought on for argument before the Circuit Court of Appeals in and for the Second Circuit, and on or about the 18th day of February, 1910, said Court handed down an opinion stating that the

motion of the plaintiff to remand the cause to the 19
State Court should be granted and that the order of Circuit Judge Lacombe denying said motion should be reversed. That thereupon a mandate was handed down by said Circuit Court of Appeals directing the Circuit Court to reverse the decree of February 23, 1909, and to remand the cause to the State Court. That thereafter and on or about the 28th day of February, 1910, an order was entered by the Honorable George W. Ray, District Judge, sitting in the Circuit Court, providing for the remand of said suit to the State Court but containing a provision to the effect that said judgment remanding said cause to the Supreme Court of the State of New York should not apply to your petitioner, Metropolitan Trust 20
Company. A copy of said order is hereto annexed, marked "Exhibit F."

NINTH.—That thereafter and on or about the 21st day of March, 1910—after the expiration of the term at which said final decree of January 10, 1908, dismissing the said bill as against your petitioner was entered and after the expiration of the time of the plaintiff to appeal from said final decree as against your petitioner—the plaintiff undertook to serve upon your petitioner a so-called notice of a motion, upon an affidavit of one Stephen M. Yeaman, annexed to said notice, to be made in the Circuit Court of the United States on the 25th day of March, 1910, for an order remanding said cause to the Supreme 21
Court of the State of New York as to your petitioner, and vacating the order and judgment entered in the office of the Clerk of the Circuit Court on the 10th day of January, 1908, dismissing the complaint in said cause as against your petitioner, and also reinstating your petitioner as a defendant in said cause. A copy of said notice of motion, together with said affidavit of said Stephen M. Yeaman, is hereto annexed, marked "Exhibit G."

TENTH.—That your petitioner appeared specially upon the return of said motion, to object to the juris-

22 diction of the Circuit Court to entertain the motion or to make any order in said cause affecting your petitioner, and filed an affidavit bringing to the attention of the Court the fact that the term at which the final decree dismissing said bill and suit as against your petitioner was entered had long since expired and that the Court was wholly without jurisdiction to hear the motion and to make and enter the order sought by the plaintiff. A copy of the affidavit filed by your petitioner is hereto annexed, marked "Exhibit H."

ELEVENTH.—That said motion was brought on for
23 argument before the Honorable Henry G. Ward, Circuit Judge of the United States, sitting in the Circuit Court of the United States for the Southern District of New York, your petitioner appearing specially upon said argument for the sole purpose of contesting the jurisdiction of the Court to make and enter any order in said cause affecting the rights of your petitioner as finally adjudged and determined by the said final decree of January 10, 1908, from which no appeal had been or could then be taken. That thereafter said Circuit Judge handed down an opinion stating that the motion of the plaintiff to vacate said decree should be granted, and that if the plaintiff desired further relief he might apply to the Honorable George W. Ray, the
24 Judge who, upon the mandate of the Circuit Court of Appeals, ordered the remand of the case to the State court. A copy of said opinion is hereto annexed, marked "Exhibit I."

TWELFTH.—The Hon. Henry G. Ward, Circuit Judge, on said opinion has made and entered an order dated April 15, 1910, which purports to vacate said final judgment dated January 10, 1908, dismissing the bill of complaint and said cause as to your petitioner. Copy of said order is hereto annexed marked "Exhibit J."

THIRTEENTH.—Your petitioner is informed by its 25
counsel, and believes that said Circuit Judge of the United States was and is wholly without jurisdiction to entertain said motion or to enter any order vacating said final decree of January 10, 1908, or any other order in said cause affecting your petitioner, and that said Judge and the said Circuit Court should be prohibited by writ of this Honorable Court from making or entering any order in the premises, and that any order that may be made or entered in the premises should be annulled and expunged from the records of said Circuit Court.

WHEREFORE your petitioner prays that an order or rule be made and issued by this Honorable Court directing the said the Honorable Henry G. Ward, 26
Circuit Judge of the United States for the Second Circuit, and directing the Circuit Court of the United States for the Southern District of New York, to show cause why a writ of prohibition or mandamus should not issue prohibiting said Judge and Court from assuming or exercising any jurisdiction over your petitioner or said final decree of January 10, 1908, or in the alternative commanding the said Judge and the said Court and each of them to annul and set aside any order that may be entered providing for the vacation of the final decree of January 10, 1908, dismissing the said bill and said cause against your petitioner, and to desist from exercising jurisdiction over your petitioner, 27
and for such other and further writ or relief as to this Honorable Court may seem just and meet, and your petitioner will ever pray, &c.

New York, April 12, 1910.

HENRY B. CLOSSON,
Attorney for Petitioner.

28 STATE of NEW YORK,
County of New York,
Southern District of New York, } ss.:

BEVERLY CHEW, being duly sworn, deposes and says: That he is the 2nd Vice-President of the Metropolitan Trust Company of the City of New York, petitioner above named; that the foregoing petition is true to the deponent's own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes the same to be true.

BEVERLY CHEW.

Subscribed and sworn to before me this 16th
29 day of April, 1910.

EDWARD C. SPERRY,
[SEAL.] Notary Public,
New York County, N. Y.

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Exhibit A.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

JAMES POLLITZ,
Plaintiff,

vs.

THE WABASH RAILROAD COMPANY, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and The Metropolitan Trust Company of the City of New York,
Defendants.

Summons.

TO THE ABOVE NAMED DEFENDANTS:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after service of this summons, exclusive of the day of service; and in case of your failure to ap-

34 pear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, January 15th, 1907.

STEPHEN M. YEAMAN,
Plaintiff's Attorney.

Office & P. O. Address:
15 William Street,
Borough of Manhattan,
New York City.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

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JAMES POLLITZ,
Plaintiff,

vs.

THE WABASH RAILROAD COMPANY, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile
36 Trust Company, United States Mortgage and Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James B. Forgan and The Metropolitan Trust Company of the City of New York,
Defendants.

} Complaint.

The plaintiff, suing in his own behalf, and in behalf of all stockholders of The Wabash Railroad

Company similarly situated, complains of the above 37
named defendants, and for cause of action alleges:

FIRST.—That the plaintiff is a citizen of the State of New York, and that the defendant The Wabash Railroad Company is, and at all the times hereinafter referred to was, a foreign consolidated corporation, duly organized and existing under the laws of the States of Missouri, Ohio, Indiana, Michigan and Illinois respectively, and at all of said times did, and now does, own and operate an extensive system of railways in all of said states. Said consolidated corporation was formed by a consolidation of the Wabash Western Railway Company, which was a foreign corporation organized 38
under the laws of the State of Missouri in or about the month of March, 1887, and the Wabash Railway Company, which was a foreign corporation organized under the laws of the States of Ohio, Indiana and Illinois in or about the month of May, 1889, and the said consolidation was completed and carried into effect in or about the month of July, 1889. That the said defendant Wabash Railroad Company as so consolidated, remains and continues to be a corporation under the laws of each of said States, and subject to the laws thereof, as were its constituent companies, and by operation and intendment of law is a citizen of each of the States under which such constituent companies were respectively originally incorporated, and upon information and belief the 39
plaintiff says that it has never ceased to be a corporation of, and subject to the laws of each of the said States respectively.

SECOND.—The above named defendants Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, Robert C. Clowry, George J. Gould, Winslow S. Pierce, Robert M. Gallaway, Thomas H. Hubbard and John T. Terry now are, and since the commencement of the year 1906 have been, directors of, and now constitute, and during said time have

40 constituted, a majority of the Board of Directors of the said defendant The Wabash Railroad Company, and the defendant Joseph J. Slocum, since about the 9th day of October, 1906, has been and now is a director of said Company, and they are all citizens of the State of New York, except the defendants Delano, Gould and Jeffery; and the Wabash Railroad Company has for many years past maintained and now maintains an office in the City of New York, for the transaction of the principal part of the financial business of the Company.

THIRD.—The defendant Frederic A. Delano is
41 President of the said defendant The Wabash Railroad Company. The defendant Edward T. Jeffery is Chairman of the Board of Directors of said Company, which Board holds its regular meetings and conducts the business of said Company in the City of New York. The defendant Edgar T. Welles is Vice-President of the said Company; the defendant John C. Otteson is Secretary and Assistant Treasurer of the said Company.

FOURTH.—The defendants Mercantile Trust Company, the United States Mortgage & Trust Company and the Metropolitan Trust Company of the City of New York, are domestic corporations duly
42 organized by, and existing under the laws of the State of New York, with their respective offices and places of business in the City of New York.

FIFTH.—The defendant Bowling Green Trust Company is a domestic corporation, duly created and organized under the laws of the State of New York, having its principal office, and conducting its business at the City of New York, and the said Trust Company, together with the defendants J. C. Van Blarcom and James B. Forgan, are the trustees named and appointed in the trust deed by way of mortgage, which has been made to them as such

trustees by the defendant The Wabash Railroad 43
Company upon all its franchises and property for the security of the payment of the principal and interest of the $200,000,000 of four per cent. bonds recently made and issued by the said Wabash Railroad Company, and hereinafter referred to.

SIXTH.—The defendants Henry Evans, Henry K. Pomroy and George M. Cumming are citizens of the State of New York, and are members of, and constitute a Committee representing and acting for owners of the debenture mortgage bonds of the said defendant Wabash Railroad Company, which Committee is hereinafter more particularly referred to, and with the co-operation and confederation of the 44
defendant Wabash Railroad Company published the plan set forth in Exhibit B hereto annexed; and the defendants Henry Evans, Henry K. Pomroy and George M. Cumming, and each of them, have since the inception of the scheme and plan which is set forth in Exhibit B hereto annexed, co-operated and confederated with the defendants Wabash Railroad Company and United States Mortgage & Trust Company in carrying out and accomplishing the said scheme and plan.

Upon information and belief, that the said defendants Evans, Pomroy and Cumming, constituting the Committee which is above referred to, and each of them, have held and owned ever since the 45
15th day of August, 1906, a large amount of the debenture bonds of the defendant The Wabash Railroad Company, which are hereinfter more particularly referred to, and now hold the same, unless said bonds have been deposited and exchanged under the plan set forth in Exhibit B hereto annexed.

SEVENTH.—The defendant Wabash Railroad Company had on October 22, 1906, a capital stock issued and outstanding as follows: $24,000,000 of preferred stock and $38,000,000 of common stock

46 and the plaintiff is, and was, prior to the 15th day of August, 1906, the owner of One Hundred Thousand Dollars ($100,000) par value of said common stock, represented by ten certificates of one hundred shares each, said shares being each of the par value of one hundred dollars ($100), and which stock now, and prior to the 15th day of August, 1906, was and is registered and then stood and now stands in the name of this plaintiff on the books of the said Company.

EIGHTH.—The said defendant Wabash Railroad Company, in or about July, 1889, created and subsequently issued debenture bonds secured by mort-
47 gage upon a part of its property, which bonds are now outstanding to the amount of $30,000,000, divided into two series: Series A consisting of $3,500,000, and Series B, consisting of $26,500,000 par value. That the principal of said bonds will not mature until July, 1939. Under the terms of the said bonds and the said mortgage indenture securing the same the interest thereon at six per cent. is payable only from and out of the net income remaining after the payment of all operating expenses, and such sums as in the judgment of the Board of Directors of said Company may be necessary to maintain and renew the railroad and its appurtenances, and keep the same in good condition, and to increase its equipment to such extent as
48 may be commensurate with its business requirements, and to pay the taxes, rentals, interest and sinking fund instalments accruing to or to accrue on any and all mortgages existing on the said property, and to satisfy all liens and charges thereon that are or may be prior in equity to said debenture mortgage bonds; and it is further provided in said bonds and said mortgage that the said interest shall not be cumulative. No interest has ever been paid by said Company on the $26,500,000 of said debenture bonds, Series B, and no interest has ever been paid upon the $3,500,000 of Series A since January, 1904.

NINTH.—That at some time during the summer 49
of the year 1906, the exact date being unknown to this plaintiff, negotiations were begun between the defendant Wabash Railroad Company and the said defendants Henry Evans, Henry K. Pomroy and George M. Cumming, acting as the Committee which is above referred to, for the purpose of agreeing upon a plan for the retirement of the said $30,000,000 of debenture mortgage bonds through the issue of other securities, both bond and stock, by the said defendant Wabash Railroad Company, and on or about the 15th day of August, 1906, after the plaintiff became a stockholder in said Company, an agreement in writing was entered into by and between the said defendants Evans, Pomroy and Cum- 50
ming, acting as such Committee, and the defendant The Wabash Railroad Company, whereby it was agreed among other things, that in the event the stockholders and debenture mortgage bondholders should, at a meeting to be subsequently called, approve said agreement, and in the event that at least ninety-five per cent. of the holders of the debenture bonds should consent to the plan proposed in and by the said agreement, the said plan should become effective. The said agreement among other things, provided that there should be issued by the defendant Wabash Railroad Company, to the holders of each One Thousand Dollars ($1,000) of debenture bonds, Series A, Seven Hundred and Seventy-five 51
Dollars ($775) par value in new four per cent. mortgage bonds, Five Hundred and Sixty Dollars ($560) par value in preferred stock, and Five Hundred and Sixty Dollars ($560) in common stock, and that there should be issued for each One Thousand Dollars ($1,000) par value of debenture mortgage bonds, Series B, Seven Hundred Dollars ($700) par value in new bonds, Five Hundred Dollars ($500) in preferred stock and Five Hundred Dollars ($500) in the common stock. The said agreement further provided that in the event no underwriting syndicate should be formed to carry

52 out the said plan, the percentage of each class of new securities to be issued for the old debenture bonds should be increased two per cent. on the par value of the said debenture bonds. The said agreement further provided that the said defendant The Wabash Railroad Company might elect to accept, for the purpose of carrying out the agreement, a less number of debenture bonds than ninety-five per cent. of Series B. The said agreement further provided that the Committee should be reimbursed all their expenses and outlays and be paid a compensation not exceeding $60,000, by the defendant The Wabash Railroad Company.

53 TENTH.—Under date of August 16, 1906, the said defendants Delano and Otteson, acting respectively as President and Secretary of the defendant Wabash Railroad Company, by order of the Board of Directors, issued a call for a special meeting of stockholders and debenture mortgage bondholders of the said Company, to be held at Toledo, Ohio, on the 22d day of October, 1906. The said meeting was called for the purpose of considering and voting and acting upon the following matters, namely:

"(1) The creation of an issue of four per cent. fifty-year refunding mortgage gold bonds of the Company to an amount not exceeding in the aggre-
54 gate the principal sum of $200,000,000, to bear date July 1, 1906, with interest at the rate of four per cent. per annum, both principal and interest being payable in gold coin of the United States, and to authorize the execution of a mortgage securing said bonds upon all of the railroads and properties of the Company owned by it at the date of said mortgage, and thereafter acquired by the use of said bonds, or the proceeds thereof, reservation being made of a sufficient number of said bonds to refund, retire and effect the exchange of the existing mortgage bonds of the Railroad Company, and of all its promissory notes and equipment obligations, the

remainder of said bonds to be issued only for the betterment, development, extension and equipment of the property of the Company, and for other lawful corporate purposes, as provided in the mortgage; and

(2) The increase of the authorized preferred capital stock of the Company by the amount of $16,500,000, such increase to consist of 165,000 shares of the par value of $100 each, and the increase of the authorized common capital stock of the Company by the amount of $81,500,000, such increase to consist of 815,000 shares of the par value of $100 each; and

(3) To authorize the issue of preferred and common capital stock of the Company to such amounts, not exceeding, however, $16,500,000 par value of each, as may be necessary to effect the exchange hereinafter mentioned of the debenture mortgage bonds of the Company; and

(4) To authorize the exchange of debenture mortgage bonds of the Company for its new bonds, hereinbefore mentioned, and its preferred and common capital stock upon terms and conditions authorized and approved by the Board of Directors; and

(5) To authorize any and all necessary action in the premises by the Board of Directors, and by the officers of the Company.

Action by the stockholders and debenture mortgage bondholders at said meeting upon all of the foregoing matters is to be dependent upon the authorization of the exchange of said debenture mortgage bonds and the exchange of the same upon the terms and conditions authorized becoming effective."

The said meeting of stockholders and debenture mortgage bondholders was held at the time and

place fixed in the said notice, at which meeting the plaintiff was present by his duly authorized proxy and attorney, and after the said meeting had been called to order and organized, and before any business was transacted, the plaintiff, by his proxy, read in the presence of all persons assembled at said meeting, a notice and protest, a copy of which is hereto annexed and marked Exhibit A, and made a part of this complaint, which said notice and protest was spread upon the minutes of said meeting.

Plaintiff further alleges that his proxy duly cast plaintiff's vote against each and all of the propositions submitted to said meeting, which propositions were the same as contained in the call for said meeting hereinabove set forth, and that said negative votes were duly noted on the minutes of said meeting. A majority of the stockholders present at said meeting, and as this plaintiff is informed and believes, about ninety per cent. in amount of the outstanding debenture mortgage bondholders then present, voted to approve and to authorize the carrying out of the said plan and scheme for the retirement of the said debenture bonds, as is more particularly set forth in Exhibit B annexed hereto, but neither all the stockholders nor all of the debenture bondholders were present at the said meeting, and a large number of both stockholders and debenture bondholders have not voted in approval of the said plan and scheme, nor in any way consented to the issue of said bonds, preferred stock or common stock. That on or about the 25th day of October, 1906, the Directors of the defendant Wabash Railroad Company, at a meeting held in the City of New York, took further action with respect to the carrying out of said plan, and the officers of the said defendant took proceedings to carry the same into effect, with the co-operation and confederation of the defendants Evans, Pomroy and Cumming, constituting the said bondholders' committee, and of the defendants United States Mortgage & Trust Company and Mercantile Trust Company.

ELEVENTH.—That on or about the 30th day of October, 1906, the said defendants Evans, Pomroy and Cumming, acting as such Committee, and with the knowledge, consent and co-operation and in combination and confederation with the defendant Wabash Railroad Company, advertised in various newspapers an agreed plan for carrying out the said scheme for the exchange of the said debenture mortgage bonds of the defendant Wabash Railroad Company for new four per cent. fifty-year gold bonds and preferred and common stock of the said Company as follows, to wit: For each One Thousand Dollars ($1,000) par value of debenture mortgage bonds Series A, Seven Hundred and Ninety-five Dollars ($795) of new bonds, Five Hundred and Eighty Dollars ($580) preferred stock and Five Hundred and Eighty Dollars ($580) common stock,—a total of Nineteen Hundred and Fifty-five Dollars ($1,955) of new bonds and stock for each One Thousand Dollars ($1,000) par value of debenture mortgage bonds Series A, and for each One Thousand Dollars ($1,000) par value of debenture mortgage bonds, Series B, Seven Hundred and Twenty Dollars ($720) of new four per cent. fifty-year gold bonds, Five Hundred and Twenty Dollars ($520) of preferred stock, and Five Hundred and Twenty Dollars ($520) of common stock, a total of Seventeen Hundred and Sixty Dollars ($1,760) of new bonds and stock for each One Thousand Dollars ($1,000) of old bonds. A copy of the said advertisement is hereto annexed and marked Exhibit B, and made a part of this complaint. 61 62 63

TWELFTH.—The said plan and scheme for the issue of said new securities, bonds and stock of the defendant Wabash Railroad Company, and the contract that they should be issued and exchanged for the said debenture mortgage bonds in the proportions above stated, were made and executed, and designed and intended to be carried out, performed and executed at the City of New York, and the

64 scheme has been in form completed and carried into effect as to more than nine-tenths of said debenture bonds by the defendant Wabash Railroad Company, its directors and officers, with the co-operation and confederation of the defendants Evans, Pomroy and Cumming, as such Committee, and of the defendants United States Mortgage & Trust Company, the Bowling Green Trust Company, Van Blarcom and Forgan, and Mercantile Trust Company, at the City of New York. The new said securities, or interim certificates therefor have been issued and the exchange has been made by the co-operation and confederation of the defendants United States Mortgage & Trust Company,
65 Bowling Green Trust Company, Van Blarcom and Forgan with the Wabash Railroad Company and said Committee of Debenture Bondholders. And on information and belief plaintiff alleges that such exchanges have been made to the amount of more than ninety per cent. of said debenture bonds. The defendant Mercantile Trust Company is the registrar of the capital stock of the defendant The Wabash Railroad Company, and as such registrar countersigns the certificates for said capital stock issued, and to be issued under said plan and scheme, which stock without such registration cannot be listed on the stock exchange nor negotiated in the market. The defendant Mercantile Trust Company is the
66 trustee under the mortgage securing the debenture bonds of the said Wabash Railroad Company. The defendant United States Mortgage & Trust Company, by agreement with the said Committee, was and acted as the depositary named in the plan set forth in Exhibit B hereto annexed, to receive the debenture mortgage bonds from the holders thereof, and to exchange the new mortgage bonds and common and preferred stock issued therefor as stated and provided in the said contract and plan, which whole plan was and is illegal, unauthorized by law, in violation of law and *ultra vires* the said Wabash Railroad Company.

THIRTEENTH.—Art. XII, Sec. 8, of the Constitution of the State of Missouri, now and prior to August 15th, 1906, in force and effect, provides and enacts as follows: 67

"No corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void."

Sec. 962 of the Revised Statutes of the State of Missouri, in force and effect now, and prior to the conception of the plan and scheme herein alleged, provides and enacts as follows:

"The stock and bonds of a corporation shall be issued only for money paid, labor done or money or property actually received. Any corporation may increase its capital stock or its bonded indebtedness with the consent of the persons holding the larger amount in value of the stock. * * * 68

But the shares of stock or bonds arising from such increase shall only be disposed of for money paid, labor done or money or property actually received. All fictitious issues or increase of stock or bonds of any corporation shall be void."

By Art. XII, Sec. 10 of the Constitution of the State of Missouri, in full force and effect now, and at and before the acts of the defendants with respect to the plan and scheme herein stated, as more particularly set forth in Exhibit B hereto annexed, it is provided and enacted that "No corporation shall issue preferred stock without the consent of all of the stockholders." 69

That by Sec. 1050 of the Revised Statutes of the State of Missouri of 1899, in full force and effect now and at and before the acts of the defendants herein stated, it is provided that before any issue of preferred stock shall be made that subject shall be submitted to the vote of the stockholders, and that no such issue shall be valid unless "all the stockholders shall consent."

70 And the plaintiff further alleges that all the holders of the capital stock of the said Wabash Railroad Company did not consent and have not consented to the increase of the preferred stock and the issue thereof by said Company, as provided to be issued and intended to be, and actually issued under the plan and scheme herein alleged, or to any increase of such preferred stock for any purpose whatsoever.

It is enacted and provided by the laws of the State of Michigan, in full force and effect now and at and before the acts of the defendants herein complained of, that the capital stock of corporations may be paid for either in cash or in real or personal property, and if paid for in property an itemized
71 description thereof must be annexed to the Articles of Association, together with the value of each item taken. That the defendant Wabash Railroad Company has not complied with such statute by inserting in its Articles of Association, or otherwise stating, the value of any property taken, or to be taken, for the issue of the common and preferred stock provided for in the plan and scheme hereinbefore stated.

That by Sec. 10 of Article II of the Constitution of the State of Illinois, and Sec. 20 of Chap. 114 of the Revised Statutes of said State, in full force and effect now and at and before the acts of the defendants herein stated, it is provided as follows:
72 "No such corporation shall issue any stock or bonds, except for money, labor or property actually received and applied to the purpose for which such corporation was organized. All stock dividends and other fictitious increase in capital stock or indebtedness of any such corporation shall be void."

That while there is no statutory regulation on the subject in the State of Indiana, the common law of that State requires that capital stock of corporations shall be paid for at par either in money, or with property at its fair value. That the said Wabash Railroad Company has not received or been paid any money or labor, nor any property within

the true intent and meaning of said Constitutions 73
and Statutes above cited, or of any of them, for the said $16,500,000 common or $16,500,000 preferred stock above described, nor for the $21,862,500 of four per cent. bonds, a part of the said issue of $200,000,000, or so much of said common and preferred stock and four per cent. bonds as have been used and applied in exchange for said debenture bonds, and that the issue thereof and the exchange thereof for said debenture bonds has added nothing to the assets and property of the Wabash Railroad Company and will only largely increase its outstanding liabilities, if held to be valid.

FOURTEENTH.—The said plan of retiring the said 74
debenture mortgage bonds hereinbefore described, by giving in exchange therefore bonds, preferred and common stock issued for said debenture bonds, is unlawful, authorized, contrary to the laws of the states by which the said defendant Wabash Railroad Company is organized, is *ultra vires* the corporation, and is unjust, inequitable and injurious to the plaintiff and to all other stockholders of the said Company who are similarly situated in the following particulars, to wit:

It is unauthorized by, and in violation and contravention of the laws of the states respectively under which the defendant Wabash Railroad Company is incorporated, and in which states the entire 75
system of railroads owned and operated by it is situated; and in this,—that the said debenture mortgage bonds were retired by the delivery to, and exchanging with the holders thereof of Nineteen Hundred and Fifty-five Dollars ($1,955) par value of the new securities of the said Wabash Railroad Company for each one thousand dollars ($1,000) par value of bonds Series A, and of Seventeen Hundred and Sixty Dollars ($1,760) of new securities for each One Thousand Dollars ($1,000) par value of bonds Series B. That the total amount of such new bonds and preferred and common stock to be

76 issued under the said plan for the retirement of, or in exchange for, the $30,000,000 of said debenture bonds, is $53,482,500 and in addition thereto $690,000 of preferred and $690,000 of common stock for the expenses of carrying out the said plan. That in said transaction the said Company did not receive either money or property, or any other consideration whatsoever for $33,000,000 of its capital stock, and the said capital stock, both common and preferred, so issued and used in redeeming or retiring the said debenture bonds, is what is known and called watered or fictitious stock, has added nothing to the property of the Company, but has increased its liabilities in the amount named and therefore is
77 illegal and without consideration and will, by reason of the violation of the laws of said states, subject the said defendant Wabash Railroad Company to liability to the forfeiture of its charter and franchises, to the damage and injury of its stockholders. That the said plan and scheme was and is illegal and *ultra vires* the defendant The Wabash Railroad Company in this,—that it increases the preferred capital stock to the amount of $16,500,000 without the consent of all the stockholders of the Wabash Railroad Company, and in direct violation of the provisions of the Constitution and Statutes of several of the domiciliary states of said Wabash Railroad Company as hereinbefore alleged,
78 in that the consent of all said stockholders as hereinbefore set forth has not been given or obtained, and particularly the consent of this plaintiff; and in that the said bonds and preferred and common stock so issued and exchanged for the said debenture bonds, were not and have not been and were never intended to be paid for in money, labor or property.

That the effect of said plan and scheme is to change the said non-cumulative, non-paying debenture bonds, the principal of which does not become due until the year 1939, and which are secured by debenture income mortgage on only a part of the

property of the said Wabash Railroad Company, 79
into bonds with a fixed interest charge, secured by mortgage upon all the present lines of railway and property of said Company, and all property to be hereafter acquired, which interest charge if not paid will subject the entire property of said Company to foreclosure and its capital stock to extinguishment; to the damage and irreparable loss of plaintiff and all other stockholders of said Company.

That the said plan places ahead of the present common stock and subordinates the same to the new issue of $16,500,000 of preferred stock in contravention of law. Dividends of seven per cent. per annum upon such new preferred stock must be paid before the common stock held by plaintiff and 80
others may receive anything, and as the issue of such preferred stock is without consideration, it dilutes that class of stock and depreciates the value and security of both the preferred and common stock outstanding at the time of the acts complained of.

That the issue of $16,500,000 par value of common stock without any consideration dilutes and makes less valuable the old common stock.

That the interest rate of four per cent. upon the $21,862,500 new mortgage bonds, which the defendant Wabash Railroad Company has issued or will issue under the plan hereinbefore set forth, will, during the next thirty-three years, the life of the 81
present debenture mortgage bonds, amount to $28,858,500, without compounding, an amount nearly sufficient to retire and pay at their maturity in 1939 the $30,000,000 of outstanding debenture bonds, and that the said interest charge on the said $21,862,500 new bonds will be taken out of the revenues of the property and the property impoverished and impaired to that extent; whereas, if the said debenture bonds are allowed to remain outstanding, all of the requirements of the said defendant Wabash Railroad Company for extensions, improvements, new equipment and other betterments may be met

82 out of the net earnings of the said Company, with no obligation to pay interest on the said outstanding debenture mortgage bonds, unless there shall be a surplus of net earnings over and above all the requirements of the Company for the matters and purposes aforesaid.

FIFTEENTH.—That notwithstanding the proposition to issue $53,482,500 of new mortgage bonds and stock in exchange for the debenture bonds, it is proposed by the said plan to keep the said debenture bonds alive as additional security for the said new mortgage bonds until all of said debenture bonds shall have been exchanged or retired.

83 That at none of the times herein stated have the said debenture mortgage bonds, either Series A or B, been worth nor have the same sold in the open market for their par value. That during the year 1906 the highest and lowest prices at which the Series A bonds have sold were 98 and 87 1/2 respectively, and that on August 15, 1906, the date of the agreement between The Wabash Railroad Company and the Committee herein referred to, the Series B bonds sold at 82, and on October 22, 1906, the date of the stockholders' meeting, Series B bonds sold at 80 1/2, and at about the same price on October 30, 1906, the date of the publication of the plan for exchange herein referred to, and on December 22,

84 1906, sold at 75, and on December 31st, 1906, they sold at 74 1/2. That the total market value of the $26,500,000 of Series B bonds at the about prices at which they have lately sold, viz., 75 cents on the dollar, is $19,875,000, while under the plan and scheme herein referred to, the said Wabash Railroad Company has issued, or will issue in exchange therefor new four per cent. bonds and preferred and common stock to the amount of $46,640,000, and for the $3,500,000 of Series A bonds, which during the year 1906 have continuously sold at less than par, and as low as 87 1/2, said Wabash Railroad Company has issued, or will issue, $6,842,500 of new four per

cent. bonds and preferred and common stock. That 85
the defendant Wabash Railroad Company, on December 22, 1906, declared operative the plan and scheme for the exchange of new bonds and stocks for the debenture mortgage bonds in this complaint and in Exhibit B hereto annexed more fully described, and a notice to that effect has been published by the defendants Evans, Pomroy and Cumming, and a further notice has been published by said Committee, dated December 31, 1906, in which it is stated that the said plan having been declared and become operative, interim certificates representing the new securities issued thereunder have been delivered to the United States Mortgage & Trust Company for distribution by it after that date to holders 86
of the receipts of that Company issued upon the deposit of the debenture mortgage bonds.

On information and belief the plaintiff alleges that the new four per cent. mortgage bonds and the preferred and common stock of The Wabash Railroad Company, or interim receipts therefor, in an amount sufficient to carry the said plan and scheme into effect, so far as the same has been assented to by depositing debenture mortgage bondholders, have been delivered to the defendant United States Mortgage & Trust Company for the purpose of effecting the exchange of securities pursuant to the plan and scheme hereinbefore referred to, and that interim certificates representing such bonds and preferred 87
and common stock respectively have been delivered to said depositing bondholders in exchange for the debenture bonds so deposited by them.

SIXTEENTH.—That the annual report of the said Wabash Railroad Company for the year ending June 30, 1906, shows a surplus only of $509,332.79 which could be applicable to the payment of interest upon the debenture mortgage bonds, which surplus is equal only to about one and seven-tenths per cent. upon the said $30,000,000 debenture bonds, but as interest would first have to be paid in full at six per

88 cent. upon the $3,500,000 of Series A bonds, there would remain only about $200,000 applicable to interest upon the $26,500,000 Series B bonds, or about one and one-eighth per cent. (1 1/8%).

That the Directors of the defendant Wabash Railroad Company, at a meeting held on or about December 22, 1906, took action declaring in effect that there were no net earnings of said Company available for the payment of interest upon the said debenture mortgage bonds, and directing that no payment of interest thereon be made. That notwithstanding such action of passing and defaulting the interest on the said debenture bonds because the same had not been earned, the directors of the de-
89 fendant Wabash Railroad Company authorized the payment of the coupons due January 1, 1907, on the new four per cent. mortgage bonds issued under the plan and scheme aforesaid, in exchange for the debenture bonds, and said coupon interest on the new bonds is being paid by the defendant United States Mortgage & Trust Company from funds furnished by the Wabash Railroad Company, to the holders of receipts issued by the United States Mortgage & Trust Company on the deposit of the debenture bonds, and the said Wabash Railroad Company, unless restrained by order of this Court, will pay the subsequently maturing instalments of interest coupons on said new four per cent. mortgage bonds.

90

SEVENTEENTH.—On information and belief, the plaintiff alleges that the defendant George J. Gould and several of the other defendants who are directors of the Wabash Railroad Company were large holders of the debenture mortgage bonds of the Wabash Railroad Company at the time of the publication of the plan and scheme set forth in Exhibit B hereto annexed, and that they have deposited the said bonds so owned by them with the United States Mortgage & Trust Company, and have received or will receive the new bonds and preferred and common stock issued under said plan. That

the defendant Metropolitan Trust Company was, 91
at the time of the publication of the plan and scheme set forth in Exhibit B hereto, the owner and holder of $5,435,000 of said debenture mortgage bonds Series B of the defendant Wabash Railroad Company, which said bonds have been deposited with the United States Mortgage & Trust Company, under the plan and scheme herein set forth, and the defendant Metropolitan Trust Company of the City of New York has received or will receive the new bonds and preferred and common stock, or interim certificates therefor issued under the said plan and scheme. That the said defendant directors of the said Wabash Railroad Company, who were holders of such debenture 92
bonds, the Metropolitan Trust Company of the City of New York and the said Bondholders' Committee will be unduly and inequitably benefited if the said scheme for the retirement of said debenture bonds be upheld and decreed valid.

EIGHTEENTH.—Plaintiff further alleges that by reason of the said unlawful combination, plan and agreement between said Wabash Railroad Company and said Debenture Bondholders' Committee, referred to in this complaint and Exhibit B hereto annexed, there have been issued and will be placed upon the market, if the said plan, scheme and combination be not declared and adjudged invalid, a 93
large amount of unlawful and invalid bonds and preferred and common stock of said Wabash Railroad Company, and plaintiff and other stockholders of said Company thereby affected will, as plaintiff is advised and believes, be obliged to resort to a multiplicity of suits to avoid and defeat said unlawful and invalid bonds and stock created, issued and incurred by said Railroad Company, and said Rail road Company itself may be directed and required to observe and obey the said laws of the said several states of its being, and its own organic and fundamental laws, and be necessitated to bring and main-

94 tain, as this plaintiff is advised and believes and charges, a multiplicity of suits to avoid and escape the force and effect of said unlawful and invalid but apparent liabilities, bonds and stock by it so incurred and issued, and the said Wabash Railroad Company will on that account be put to great expense and loss by reason thereof.

NINETEENTH.—The said defendants herein named as directors or officers of The Wabash Railroad Company have been such officers and directors respectively at all the times since August 1st, 1906, except defendant Slocum, who was elected a director October 9th, 1906, and have acted and
95 exercised their powers as such in ordering, assisting and participating in doing the acts and things herein alleged, to carry into effect the said plan and scheme, and are still such directors and officers respectively, in full and complete command and control of the said Wabash Railroad Company and its affairs, with interests and motives adverse to and against the institution, by the said Wabash Railroad Company, of any action or legal proceedings to obtain the relief herein demanded; and any request or demand by the plaintiff or any other stockholders that said Wabash Railroad Company commence such action or proceedings would be useless and futile. That the defendants herein,
96 except the Metropolitan Trust Company, during all the times herein stated, have proceeded to do the acts and to carry into effect the plan and scheme herein alleged and complained of, with full notice and knowledge of plaintiff's protest against the same, and of all the objections thereto and the illegality thereof.

Wherefore, the plaintiff demands judgment against the defendants as follows:

I.—That the plan and scheme for the issue and delivery of fifty year four per cent. gold mortgage bonds and the preferred and common stock of the

Wabash Railroad Company in exchange for, or re- 97
tirement of the debenture mortgage bonds Series A and B of said Wabash Railroad Company, as set forth in this complaint and Exhibit B hereto attached, be decreed and adjudged to be *ultra vires* the said Wabash Railroad Company, illegal and void, and that all said bonds and preferred and common stock issued and used or applied by said Wabash Railroad Company for the purposes stated in said plan and scheme be decreed and adjudged illegal, void and of no effect; and that the defendants Wabash Railroad Company, United States Mortgage & Trust Company, Bowling Green Trust Company, J. C. Van Blarcom and James B. Forgan and each of them be decreed and ordered to re-exchange 98
and redeliver any and all of the debenture mortgage bonds of the Wabash Railroad Company, Series A and B, held by them or any of them, which have been by the owners thereof exchanged for new mortgage bonds, preferred and common stock of the Wabash Railroad Company under the plan and scheme in this complaint described, to the holders of said new four per cent. mortgage bonds, preferred and common stock, in the same proportions as they were issued in exchange for the debenture mortgage bonds under said plan and scheme, to the end that the depositing debenture bondholders, or their assigns, the holders of said new bonds and preferred and common stock may be restored to 99
their original position as holders of the debenture mortgage bonds.

II.—And in default of the relief above prayed for:

That the defendants who are officers and directors of the defendant The Wabash Railroad Company, to wit, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, Robert C. Clowry, George J. Gould, Winslow S. Pierce, Robert M. Gallaway, Thomas H. Hubbard, John T. Terry, and Joseph J.

100 Slocum, and each of them, and the defendant United States Mortgage & Trust Company, be adjudged and decreed to restore and return to the said Wabash Railroad Company all of the fifty-year four per cent. mortgage bonds, and all of the preferred and common stock of the defendant The Wabash Railroad Company, which have been or may hereafter be issued and used in exchange for such debenture bonds. And in the event that for any reason they shall be unable to do so, that they, and each of them, be ordered and decreed to pay into the treasury of The Wabash Railroad Company the aggregate par value of such bonds and common and preferred stock so issued, and that the defendant
101 the Mercantile Trust Company be ordered and adjudged to return and deliver to said Wabash Railroad Company all of the shares of common and preferred stock so issued which have been or may be countersigned by said Trust Company, and used in exchange for such debenture bonds, and in default of said Mercantile Trust Company being for any reason unable to do so, to pay into the treasury of the said Wabash Railroad Company the par value of such common and preferred stock so countersigned, issued and used. And in default of such relief, that the said defendants and each of them be ordered to account for and pay into the treasury of the Wabash Railroad Compaay so much of the par
102 value of the said bonds and stocks so issued and exchanged for the said debenture bonds as may be found to exceed the actual market value of the said debenture bonds at the time such exchange was made.

And that the said defendant The Metropolitan Trust Company of the City of New York be ordered and adjudged to return to said Wabash Railroad Company, all of the bonds and common and preferred stock of the Wabash Railroad Company so received by it in exchange for $5,435,000 of said debenture bonds, and in default of being unable for any reason to so return the said bonds and stock,

that it be adjudged and decreed to pay into 103
the treasury of the said Wabash Railroad Company so much of the par value of such bonds and p eferred and common stock so received by it in exchange for the said debenture bonds as may be found to exceed the actual market value of such debenture bonds at the time the exchange was made.

III.—That pending this action, and until the final determination thereof, the defendant The Wabash Railroad Company, its officers, agents, attorneys and servants, be enjoined and restrained from any further proceedings to carry into effect the said plan and scheme of exchanging its bonds, common 104
and preferred stock for its outstanding bonds, which have not yet been deposited or exchanged in pursuance of such plan.

IV.—That pending this action, and until the final determination thereof, the defendant Wabash Railroad Company be enjoined and restrained from paying any interest upon any of its fifty-year four per cent. mortgage bonds which have been issued or may hereafter be issued in exchange for said debenture mortgage bonds under the plan and scheme in this complaint alleged and set forth, and that said defendant be further enjoined and restrained from transferring upon its books any certificates 105
representing any of its preferred or common stock which have been, or may hereafter be issued in exchange for the debenture bonds under said plan and scheme; and that the said defendant be further enjoined and restrained from paying any dividends upon any part of its preferred stock issued in exchange for the debenture mortgage bonds under the said plan and scheme; and that the said defendant Wabash Railroad Company, its officers, agents, servants and attorneys, be enjoined and restrained from receiving or counting, or permitting to be received and counted, any votes at any meeting of the

106 stockholders of said Company, on the shares of preferred and common stock issued in exchange for the said debenture mortgage bonds under said plan and scheme.

V.—That pending this action and until the final determination thereof, the defendant Mercantile Trust Company be enjoined and restrained from countersigning as registrar any certificates representing the preferred or common stock of the defendant Wabash Railroad Company which have been or may be hereafter issued in further carrying out the plan and scheme in this complaint set forth, and be further enjoined and restrained from countersigning any certificates representing preferred
107 or common stock which may be hereafter issued by the defendant Wabash Railroad Company as a reissue or transfer of the certificates for said preferred and common stock issued under said plan and scheme.

VI.—That the defendants Jeffery, Delano, Welles, Clowry, Gould, Pierce, Gallaway, Hubbard, Terry and Slocum, who are directors of the defendant Wabash Railroad Company, and the defendant John C. Otteson, who is secretary and assistant treasurer of said corporation defendant, and each of them, be ordered to account to the said Wabash Railroad Company, and to pay into the treasury of said Company all moneys which have been, or may
108 be hereafter paid as interest upon any or all of the fifty-year four per cent. mortgage bonds herein referred to, which have been or may be issued in exchange for the debenture mortgage bonds of the said Wabash Railroad Company under the plan and scheme set forth in this complaint and Exhibit B.

And that the plaintiff have such other and further order and relief as may be equitable and proper.

STEPHEN M. YEAMAN,
Attorney for Plaintiff.
Office & P. O. Address:
15 William Street,
Borough of Manhattan,
New York City.

STATE OF NEW YORK, } ss.: 109
County of New York, }

JAMES POLLITZ, being duly sworn, says that he is the plaintiff in the above entitled action, that he has read the foregoing complaint, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief; and as to those matters he believes it to be true.

Sworn to before me this }
day of January, 1907. }

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EXHIBIT "A."

TO THE STOCKHOLDERS AND DEBENTURE MORTGAGE BONDHOLDERS OF THE WABASH RAILROAD COMPANY, IN SPECIAL MEETING ASSEMBLED AT TOLEDO, OHIO, OCTOBER 22, 1906, PURSUANT TO A CALL SIGNED BY THE PRESIDENT AND SECRETARY OF SAID COMPANY, DATED NEW YORK, AUGUST 16, 1906:

TAKE NOTICE:

The undersigned, the holder of one thousand shares of the common capital stock of the Wabash Railroad Company, hereby protests against any action being taken at this meeting, or any adjournment thereof, by the stockholders or debenture mortgage bondholders of that Company, which attempts or purports to authorize, in any manner, or to any extent, the carrying out of the plan to issue new four per cent. fifty-year mortgage bonds and preferred and common stock of the Company, in exchange for the debenture mortgage bonds as set forth in the call for this meeting, and the explanatory circular issued by the President and Sec- 111

112 retary of said Company under date of September 8, 1906, for the following reasons, among others:

1. In the circular issued by the said Company under date of September 8, 1906, it is proposed to issue to the holders of $30,000,000 mortgage debenture bonds upon which interest is payable only if earned, and upon $26,500,000 of which no interest has ever been paid, $21,262,500 of the proposed new four per cent. fifty-year mortgage bonds, $15,210,000 of preferred stock and $15,210,000 of common stock, or new bonds and stock to the amount of $51,682,500 to retire the $30,000,000 of debenture bonds, and to the extent of $21,682,500 the new stock will be fictitious, without considera-
113 tion and void.

2. The Constitution of the State of Missouri provides that capital stock can only be issued for money paid, labor done or property actually received, and that all fictitious increase of stock is void, and the laws of the other states wherein said Company is incorporated, to wit: Ohio, Indiana, Illinois, Michigan and Iowa provide that capital stock can only be issued at par for money or property at its fair value.

3. The said proposition alters the position of the present stockholders in the following respects,
114 among others:

A. The changing of a non-cumulative, non-paying bond, the principal of which does not become due until 1939, into a bond with a fixed interest charge, which if not paid, will subject the property to foreclosure and the capital stock to extinguishment.

B. It places ahead of the present common stock $15,210,000 of preferred stock, upon which dividends of seven per cent. must be paid before the common stock may receive anything, and to the ex-

tent of $6,472,500 the proposed issue of preferred 115
stock will be without any consideration, thus diluting that class of stock and depreciating the value of both the preferred and common stock.

C. It is proposed to issue $15,210,000 of common stock without consideration, thereby diluting and making less valuable the present common stock.

4. The debenture mortgage bondholders are disqualified to vote upon this proposition, which contemplates their advantage and enrichment to the injury of the present stockholders, and changing the position of the debenture mortgage bonds from a non-cumulative, non-paying security to that of a 116
foreecloseable mortgage bond with a definite fixed charge.

I respectfully request that the foregoing protest be entered in full upon the minutes of this meeting, and it is herewith handed to the Secretary for that purpose.

JAMES POLLITZ,
By his Proxy and Attorney,
STEPHEN M. YEAMAN.

Toledo, Ohio, October 22, 1906.

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EXHIBIT "B."

TO THE HOLDERS OF DEBENTURE MORTGAGE BONDS, SERIES A AND SERIES B, OF THE WABASH RAILROAD COMPANY:

The undersigned, acting as a Committee of Debenture Mortgage Bondholders, Series B of The Wabash Railroad Company, have been engaged for some time in negotiating an arrangement whereby the Railroad Company may exchange and retire its Debenture Mortgage Bonds, provide for the refund-

ing and retirement of all of its bonded indebtedness, funded notes and equipment obligations and for the capital expenditures required for the development, improvement and extension of its property to meet the requirements of its increased business and the standards of its competitors. As the result of such negotiations, the Committee has concluded an agreement with the Railroad Company embodying the following

PLAN:

The Railroad Company has authorized by action of its Stockholders and Debenture Mortgage Bondholders, at a special meeting held on October 22, 1906, the creation of an issue of refunding bonds to be known as its First Refunding and Extensions Mortgage Fifty-Year Four Per Cent. Gold Bonds, to an amount not exceeding in the aggregate the principal sum of $200,000,000 at any one time outstanding, to be dated July 1, 1906, to mature July 1, 1956, and to bear interest at the rate of four per cent. per annum, payable semi-annually on the first days of January and July in each year. All of said bonds are to be secured by a mortgage, similarly authorized and approved, upon all of its railroad and property, and are to be issued for the purpose of refunding and retiring all of the present bonded indebtedness of the Railroad Company, including the exchange of its Debenture Mortgage Bonds, as hereinafter mentioned, as well as retiring its funded notes and equipment obligations, paying bonds of other companies assumed or guaranteed by it, and providing funds for the development of the railroads and properties of the Railroad Company.

The Railroad Company has also authorized the increase and issue of its preferred and common capital stock in amounts necessary to carry out and complete the exchange of its Debenture Mortgage Bonds upon the terms hereinafter mentioned.

TERMS OF EXCHANGE.

121 Holders of debenture mortgage bonds of the Railroad Company who shall, on or before November 30, 1906, deposit their bonds, duly assigned for transfer, with the United States Mortgage and Trust Company, at its office, No. 55 Cedar Street, New York City, will receive therefor negotiable deposit receipts entitling the holders thereof to receive, upon the surrender thereof and upon the due execution of the proposed mortgage and the issue of the bonds secured thereby and upon the issue of preferred and common capital stock of the Railroad Company in such amounts as may be necessary for the purposes of the exchange, the following securities:

122 For each $1,000, par value, of Debenture Mortgage Bonds, Series A, $795, par value of new bonds, $580, par value, in preferred stock, and $580, par value, in common stock, of the Railroad Company.

For each $1,000, par value, of Debenture Mortgage Bonds, Series B, $720, par value, in new Bonds; $520, par value, in preferred stock, and $520, par value, in common stock of the Railroad Company.

Scrip will be issued in adjnstment of fractional amounts.

The new bonds will bear interest from July 1, 1906.

123 The foregoing plan of exchange is set forth in the agreement between the undersigned and the Railroad Company above mentioned, to which all bondholders depositing their bonds become parties and wherein it is provided that depositors are bound by all of the provisions and limitations therein contained. Copies of this agreement may be obtained by bondholders upon application at the office of the United States Mortgage and Trust Company, No. 55 Cedar Street, New York City.

In case at least 95 per cent. in face value of the Debenture Mortgage bonds, Series B, shall not be

deposited for exchange, as aforesaid (unless the Railroad Company shall elect to accept the amount of bonds which shall be so deposited as sufficient for the purpose of carrying out the exchange), then the deposited bonds are to be returned without charge upon surrender of the deposit receipts issued with respect thereof.

Upon the issue of the new bonds and preferred and common stock, the same will be delivered by the Railroad Company to the United States Mortgage and Trust Company in exchange for the Debenture Mortgage Bonds deposited with the Trust Company, which bonds shall be pledged under the new mortgage and kept alive as therein provided until the entire issue of Debenture Mortgage Bonds shall have been acquired and exchanged. The new securities so received by the Trust Company will be delivered by it to the holders of its deposit receipts upon the surrender thereof.

In case the new securities, or interim certificates representing the same, shall not be issued and ready for delivery to the holders of deposit receipts on or prior to December 31, 1906, the deposited Debenture Mortgage Bonds will be returned without charge to the holders of deposit receipts upon the surrender thereof.

If the plan for the exchange of Debenture Mortgage Bonds shall become operative, all moneys heretofore received by the undersigned from holders of Debenture Mortgage Bonds under the terms of the agreement constituting the undersigned a Committee will be returned to the persons from whom the same were received.

The foregoing plan was submitted at a special meeting of the Stockholders and Debenture Mortgage Bondholders of the Railroad Company held on October 22, 1906, at which meeting there was the largest representation of Debenture Mortgage Bonds and Stock in the history of the Railroad Company, with only one exception (in 1892), and was duly authorized and approved, about 90 per cent.

of all outstanding Debenture Mortgage Bonds voting in favor of its adoption without any dissenting votes. 127

The Committee believes that the plan secures to Debenture Mortgage Bondholders a most desirable result, extending, as it does, their interest over the entire property of the Railroad Company on the basis of a fixed return upon their investment, and affording to them as Stockholders an interest in the surplus revenues of the Com pany, as well as in the future development and growth of the property through the application of resources provided by the new bonds.

The Committee, as well as the individual members, have agreed to deposit for exchange all Debenture Mortgage Bonds, owned or controlled by them, and recommend to Debenture Mortgage Bondholders the prompt deposit and exchange of their bonds. 128

HENRY EVANS,
HENRY K. POMROY,
GEORGE M. CUMMING,
Committee.

WILLIAM C. TRULL,
Counsel.

DAVID RUMSEY,
Secretary.

New York City, October 30, 1906. 129

130 **Exhibit B.**

At a Stated Term of the Circuit Court of the United States in and for the Southern District of New York, held at the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 21st day of February, 1907.

Present: Hon. E. HENRY LACOMBE,
Circuit Judge.

JAMES POLLITZ,
Plaintiff,

131

vs.

THE WABASH RAILROAD COMPANY, EDWARD T. JEFFERY, FREDERIC A. DELANO, EDGAR T. WELLES, JOHN C. OTTESON, ROBERT C. CLOWRY, ROBERT M. GALLAWAY, THOMAS H. HUBBARD, GEORGE J. GOULD, WINSLOW S. PIERCE, JOHN T. TERRY, JOSEPH J. SLOCUM, MERCANTILE TRUST COMPANY, UNITED STATES MORT-
132 GAGE AND TRUST COMPANY, HENRY EVANS, HENRY K. POMROY, GEORGE M. CUMMING, THE BOWLING GREEN TRUST COMPANY, J. C. VAN BLARCOM, JAMES B. FORGAN and THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
Defendants.

This suit having been commenced in the New York Supreme Court in and for the County of New

York, and having been removed to this Court upon 133
the petition of the above named defendant The Wabash Railroad Company, and the plaintiff herein having moved to remand this suit to the New York Supreme Court in and for the County of New York from which it came, and said motion having come on regularly to be heard, and Stephen M. Yeaman, Esq., of counsel for the plaintiff, having appeared in support of said motion, and Rush Taggart, Esq., of counsel for the above named defendant The Wabash Railroad Company, having appeared in opposition to said motion, and the same having been fully considered and the opinion of this Court having been delivered, it is now, in accordance with said opinion, 134

Ordered, that said motion be and the same is hereby denied.

Enter.

E. HENRY LACOMBE,
Circuit Judge.

135

136 **Exhibit C.**

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

JAMES POLLITZ,
Complainant,

AGAINST

THE WABASH RAILROAD COMPANY, EDWARD T. JEFFERY, FREDERIC A. DELANO, EDGAR T. WELLES, JOHN C.
137 OTTESON, ROBERT C. CLOWRY, ROBERT M. GALLAWAY, THOMAS H. HUBBARD, GEORGE J. GOULD, WINSLOW S. PIERCE, JOHN T. TERRY, JOSEPH J. SLOCUM, MERCANTILE TRUST COMPANY, UNITED STATES MORTGAGE AND TRUST COMPANY, HENRY EVANS, HENRY K. POMROY, GEORGE M. CUMMING, THE BOWLING GREEN TRUST COMPANY, J. C. VAN BLARCOM, JAMES B. FORGAN and THE
138 METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
Defendant.

THE DEMURRER OF THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, ONE OF THE ABOVE NAMED DEFENDANTS, TO THE BILL OF COMPLAINT OF JAMES POLLITZ, THE PLAINTIFF ABOVE NAMED.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's

bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth: 139

I. That it appears by the plaintiff's own showing by the said bill of complaint that he is not entitled to the relief prayed thereby against this defendant or to any discovery from this defendant or to any relief against it as to the matters contained in the said bill or any of such matters.

II. That the said bill is exhibited against this defendant and against several other defendants to the said bill for several and distinct and independent matters and causes which have no relation to each other and which have been improperly united, and in which, or the greater part of which, this defendant is in no way interested or concerned and ought not to be implicated; and that the said bill is altogether multifarious. 140

III. That it appears upon the face of the bill of complaint that the relief prayed for therein cannot properly be granted without making parties to said bill persons not now parties thereto, in that the owners and holders of the Fifty Year Four Per Cent. Gold Mortgage Bonds and Preferred and Common Stock of the Wabash Railroad Company, which bonds and preferred and common stock, it is alleged in said Bill have been or are about to be exchanged for the Debenture Mortgage Bonds, Series A and B, of the said Wabash Railroad Company, and the owners and holders of said Debenture Mortgage bonds, Series A and B, all mentioned in such Bill are not in any manner either personally or by representation made parties to said Bill; and that it appears upon the face of the said Bill that the said owners and holders of said Gold Mortgage Bonds and said Preferred and Common Stock and said Debenture Bonds are necessary parties to said Bill. 141

142 WHEREFORE, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto, and humbly prays the judgment of this Court whether it shall be compelled to make any further or other answer to said Bill; and further prays to be hence dismissed with its costs and charges in this behalf sustained.

February 4th, 1907.

PARSONS, CLOSSON & MCILVAINE,
Solicitors for Defendant, Metropolitan Trust Company of the City of New York,
Office and Post Office address:
52 William St.,
143 Borough of Manhattan,
The City of New York.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:
County of New York,

BEVERLY CHEW, being duly sworn, deposes and says, that he is the Second Vice-President of the defendant Company above named; that the foregoing demurrer is not interposed for delay.

BEVERLY CHEW.

Subscribed and Sworn to before me, this 4th day of February, 1907,

AUGUSTUS E. VOLGER,
144 [NOTARY SEAL] Notary Public, Kings County, N. Y.
Certificate filed in New York County.

I HEREBY CERTIFY, that in my opinion the foregoing demurrer is well founded in point of law.

Dated, New York, February 4th, 1907.

TOMPKINS MCILVAINE,
Of Counsel for Defendant, Metropolitan Trust Company of the City of New York,
52 William Street,
Borough of Manhattan, City of New York, N. Y.

Exhibit D.

CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JAMES POLLITZ,
Plaintiff,
(Law 7091)

AGAINST

THE WABASH RAILROAD COMPANY, EDWARD T. JEFFERY, FREDERIC A. DELANO, EDGAR T. WELLES, JOHN C. OTTESON, ROBERT C. CLOWRY, ROBERT M. GALLAWAY, GEORGE J. GOULD, THOMAS H. HUBBARD, WINSLOW S. PIERCE, JOHN T. TERRY, MERCANTILE TRUST COMPANY, UNITED STATES MORTGAGE and TRUST COMPANY, HENRY EVANS, HENRY K. POMROY and GEORGE M. CUMMING,
Defendants.

JAMES POLLITZ,
Plaintiff,
(Law 27)

AGAINST

THE WABASH RAILROAD COMPANY, EDWARD T. JEFFERY, FREDERIC A. DELANO, EDGAR T. WELLES, JOHN C. OTTESON, ROBERT C. CLOWRY, ROBERT M. GALLAWAY, GEORGE J. GOULD, THOMAS H. HUBBARD, WINSLOW S. PIERCE, JOHN T. TERRY, JOSEPH J. SLOCUM, MERCANTILE TRUST COMPANY, UNITED STATES MORTGAGE & TRUST COMPANY, HENRY EVANS, HENRY K. POMROY, GEORGE M. CUMMING, THE BOWLING GREEN TRUST COMPANY, J. C. VAN BLARCOM, JAMES B. FORGAN and THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
Defendants.

The defendants United States Mortgage & Trust Company, Henry Evans, Henry K. Pomroy, George

148 M. Cumming, John T. Terry, Robert M. Gallaway, Thomas H. Hubbard, Winslow S. Pierce, John C. Otteson and Mercantile Trust Company having demurred to the plaintiff's bill of complaint in the first of the above entitled consolidated causes; and the defendants Winslow S. Pierce, John C. Otteson, Edward T. Jeffery, Henry Evans, Henry K. Pomroy, George M. Cumming, Metropolitan Trust Company of the City of New York, United States Mortgage & Trust Company and Mercantile Trust Company having demurred to the plaintiff's bill of complaint in the second of the above consolidated causes; and the two above entitled causes having been consolidated by an order of this Court entered
149 on or about the 14th day of June, 1907, which order directed that all pleadings thereafter filed, and proceedings thereafter had, shall be in the above entitled consolidated cause; and all of said demurrers having been set down for hearing, and having been duly brought on to be heard at a stated term of this Court, held on the 28th day of October, 1907, and after hearing Messrs. Pierce & Greer for the defendants John T. Terry, Robert M. Gallaway, Thomas H. Hubbard, Winslow S. Pierce, Edward T. Jeffery, and John C. Otteson; Messrs. Davies, Stone & Auerbach for the defendant United States Mort gage & Trust Company; Mr. William C. Trull and Mr. David Rumsey for the defendants Henry Evans,
150 Henry K. Pomroy and George M. Cumming; Messrs. Alexander & Green for the defendant Mercantile Trust Company; and Messrs. Parsons, Closson & McIlvaine for the defendant Metropolitan Trust Company of the City of New York, in support of said demurrers, and Mr. Abram J. Rose, of counsel for the plaintiff, in opposition, and due deliberation having been had,

Now, on motion of Stephen M. Yeaman, solicitor for the above named plaintiff, it is

ORDERED. ADJUDGED AND DECREED that the demurrers of the defendants United States Mortgage &

Trust Company, Henry Evans, Henry K. Pomroy, 151
George M. Cumming, John T. Terry, Robert M. Gallaway, Thomas H. Hubbard, Winslow S. Pierce, John C. Otteson and Mercantile Trust Company, interposed in the first of the above entitled consolidated causes; and that the demurrers of the defendants Winslow S. Pierce, John C. Otteson, Edward T. Jeffery, Henry Evans, Henry K. Pomroy, George M. Cumming and the United States Mortgage & Trust Company and the Mercantile Trust Company, interposed to the second of the above entitled consolidated causes, be, and the same hereby are, and each of the said demurrers is, overruled, and with leave to each of said defendants to answer the plaintiff's bill of complaint within twenty days af- 152
ter notice of the entry of this order;

And upon motion of Parsons, Closson & McIlvaine, solicitors for the defendant, the Metropolitan Trust Company of the City of New York, it is

ORDERED, ADJUDGED AND DECREED that the demurrer of the defendant the Metropolitan Trust Company of the City of New York, be, and the same hereby is sustained, and that the bill of complaint be, and the same hereby is, dismissed as to the defendant the Metropolitan Trust Company of the City of New York, with costs.

Let this order be entered in resettlement of the order herein, made and entered in the office of the Clerk of the Circuit Court of the United States, on 153
the 17th day of December, 1907.

Dated, New York, January 10th, 1908.

JOHN R. HAZEL,
U. S. J.

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Exhibit E.

At a Term of the Circuit Court of the United States, held in and for the Southern District of New York, in the City of New York, on the 23d day of February, 1909.

Present, Hon. George W. Ray, District Judge.

James Pollitz,
Plaintiff,

vs.

The Wabash Railroad Company, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C.
155 Otteson, Robert C. Clowry, Robert M. Gallaway, George J. Gould, Thomas H. Hubbard, Winslow S. Pierce, John T. Terry, Mercantile Trust Company, United States Mortgage and Trust Company, Henry Evans, Henry K. Pomroy and George M. Cumming,
Defendants.

Law 7091.

James Pollitz,
Plaintiff,

vs.

156 The Wabash Railroad Company, Edward T. Jeffery, Frederic A. Delano, Edgar T. Welles, John C. Otteson, Robert C. Clowry, Robert M. Gallaway, Thomas H. Hubbard, George J. Gould, Winslow S. Pierce, John T. Terry, Joseph J. Slocum, Mercantile Trust Company, United States Mortgage and Trust Company, Henry Evans, Henry K. Pomroy, George M. Cumming, The Bowling Green Trust Company, J. C. Van Blarcom, James E. Forgan and The Metropolitan Trust Company of the City of New York,
Defendants.

Law 27.

Consolidated Cause.

Decree.

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This consolidated cause having come on for final hearing on the bill of complaint of James Pollitz in the first of the above-entitled suits (law 7091), the answers of the defendants The Wabash Railroad Company, United States Mortgage and Trust Company, The Mercantile Trust Company, Evans, Pomroy, Cumming, Terry, Gallaway, Hubbard, Pierce and Otteson to said bill of complaint, and the replications of the complainant to said answers; the bill of complaint of the complainant in the second of the above-entitled suits (law 27), the answers of the defendants The Wabash Railroad Company, United States Mortgage and Trust Company, The Mercan- 158
tile Trust Company, Bowling Green Trust Company, Evans, Pomroy, Cumming, Pierce, Otteson and Jeffery to said bill of complaint, the replications of the complainant to said answers, the amendment to said answer of the defendant The Wabash Railroad Company, and the replication of the complainant to said amendment to said answer; the cross-complaint of The Wabash Railroad Company against James Pollitz, the answer of said cross-defendant to said cross-complaint, and the replication of said cross-complainant to said answer; and upon proofs taken by and on behalf of the several parties above named, and arguments having been made and submitted by Stephen M. Yeaman, Abram J. Rose and Alfred C. 159
Pette, on behalf of the complainant and cross-defendant James Pollitz, by Rush Taggart, Lawrence Greer and F. C. Nicodemus, Jr., on behalf of the defendant and cross-complainant The Wabash Railroad Company, by William C. Trull, on behalf of the defendants Evans, Pomroy and Cumming, by Alexander & Green and William W. Green, on behalf of the defendants The Mercantile Trust Company, by Davies, Stone & Auerbach, on behalf of the defendant United States Mortgage and Trust Company, by Pierce & Greer, on behalf of the defendants Pierce, Otteson, Gallaway, Terry, Jeffery

160 and Hubbard, and by Thompson, Vanderpoel & Freedman, on behalf of the defendant Bowling Green Trust Company—

Now, upon due consideration of the pleadings, the evidence and the arguments of counsel, it is—

ORDERED, ADJUDGED AND DECREED:

1. That the bill of complaint in the first of the above-entitled suits (law 7091) be and the same is hereby dismissed on the merits, and that the defendants recover from the complainant their costs and disbursements, to be taxed by the Clerk, and have execution therefor.

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2. That the bill of complaint in the second of the above-entitled suits (law 27) be and the same is hereby dismissed on the merits, and that the defendants recover from the complainant their costs and disbursements, to be taxed by the Clerk, and have execution therefor.

3. That the contract referred to in the cross-complaint of The Wabash Railroad Company against James Pollitz, which said contract is between The Wabash Railroad Company and Henry Evans, Henry K. Pomroy and George M. Cumming, as a Committee representing holders of Debenture Mort-
162 gage Bonds, Series B, of The Wabash Railroad Company, and is dated August 15, 1906; the plan for the exchange and ultimate retirement of the Debenture Mortgage Bonds, Series A and Series B, of The Wabash Railroad Company provided in said contract; and the First Refunding and Extensions Mortgage 4% Fifty-Year Gold Bonds and preferred stock and common stock of The Wabash Railroad Company issued, or to be issued, under and pursuant to the provisions of said contract, or in consummation of said plan of exchange, are in all respects legal and valid; and that said contract may be lawfully carried out and said plan of exchange

be fully consummated; and that the cross-defend- 163
ant James Pollitz be and he is hereby permanently enjoined and restrained from commencing any action or actions in any court, or prosecuting any existing action or actions wheresoever pending, or taking any other steps or proceedings to interfere with or prevent the carrying out of said contract or the consummation of said plan of exchange, or to question the legality or validity of the First Refunding and Extensions Mortgage 4% Fifty-Year Gold Bonds or preferred stock or common stock of The Wabash Railroad Company issued or to be issued pursuant to said contract or in consummation of said plan of exchange, or any action heretofore or hereafter taken in pursuance thereof except that 164
he may take and prosecute an appeal from the decree herein; and that the cross complainant recover from the cross-defendant James Pollitz its costs and disbursements, to be taxed by the Clerk, and have execution therefor.

Enter,

GEO. W. RAY,
U. S. Judge.

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Exhibit F.

ORDER OF CIRCUIT COURT OF UNITED STATES

FOR SOUTHERN DISTRICT OF NEW YORK.

At a stated Term of the Circuit Court of the United States for the Southern District of New York, held at the court-rooms thereof in the United States Post Office and Court House Building, in the Borough of Manhattan, in the City, County and State of New York, on the 28th day of February, 1910.

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Present: Hon. GEORGE W. RAY, *Judge*.

JAMES POLLITZ,
Plaintiff,
(Law 7091)

vs.

THE WABASH RAILROAD COMPANY, EDWARD T. JEFFERY, FREDERIC A. DELANO, EDGAR T. WELLES, JOHN C. OTTESON, ROBERT C. CLOWRY, ROBERT M. GALLAWAY, GEORGE J. GOULD, THOMAS H. HUBBARD, WINSLOW S. PIERCE, JOHN T. TERRY,
168
MERCANTILE TRUST COMPANY, UNITED STATES MORTGAGE AND TRUST COMPANY, HENRY EVANS, HENRY K. POMROY and GEORGE M. CUMMING,
Defendants.

Consolidated Cause.

JAMES POLLITZ,
Plaintiff,
(Law 27)

vs.

THE WABASH RAILROAD COMPANY, EDWARD T. JEFFERY, FREDERIC A. DELANO, EDGAR T. WELLES, JOHN C. OTTESON, ROBERT C. CLOWRY,

ROBERT M. GALLAWAY, THOMAS H. HUBBARD, GEORGE J. GOULD, WINLOW S. PIERCE, JOHN T. TERRY, JOSEPH J. SLOCUM, MERCANTILE TRUST COMPANY, UNITED STATES MORTGAGE AND TRUST COMPANY, HENRY EVANS, HENRY K. POMROY, GEORGE M. CUMMING, THE BOWLING GREEN TRUST COMPANY, J. C. VAN BLARCOM, JAMES B. FORGAN and THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, 169

Defendants.

This cause having been brought up upon the mandate herein sent down from the United States Circuit Court of Appeals for the Second Circuit, 170 and now on file in this Court, by which mandate it appears that an appeal was taken by the complainant from the decree of the Circuit Court of the United States for the Southern District of New York, entered herein on the 25th day of February, 1909, to the United States Circuit Court of Appeals for the Second Circuit, and that a decree has been entered in said United States Circuit Court of Appeals, reversing the said decree of this Court, and said mandate directing that the said decree of this Court be reversed, with the costs of the said appeal, taxed at the sum of One Thousand Three Hundred and Twenty-one Dollars and Forty-one cents ($1,321.41) and directing this Court to permit the complainant to discontinue the first of these consolidated causes, on payment of costs accrued at the time the motion to discontinue was made, and to dissolve the injunction which was contained in the said decree of this Court, and to remand the second of these consolidated causes to the Supreme Court of the State of New York, with costs,—all of the costs to be paid by the defendant The Wabash Railroad Company, and said mandate directing that such further proceedings be had in said cause in accordance with the decision of said United States 171

172 Circuit Court of Appeals, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding; and the costs of the defendant The Wabash Railroad Company in the first of these consolidated causes, to the time the motion was made to discontinue said cause, having been taxed at the sum of Twenty Dollars ($20.), and the costs of the complainant in these consolidated causes having been taxed at the sum of One Thousand Eight Hundred and Forty-four Dollars and thirty-six cents ($1,844.36), including costs of the United States Circuit Court of Appeals as the same appear in said mandate, leaving a balance of costs due complain-
173 ant by the defendant The Wabash Railroad Company of One Thousand Eight Hundred and Twenty-four Dollars and thirty-six cents ($1,824.36).

NOW, THEREFORE, in accordance with the said mandate it is, on motion of Stephen M. Yeaman, solicitor for complainant in the above consolidated cause,

ORDERED, ADJUDGED AND DECREED, that the said judgment and decree of the United States Circuit Court of Appeals for the Second Circuit be, and the same hereby is, made the judgment and decree of this Court, and that such further proceedings be
174 had therein in accordance with the said decision and mandate of said United States Circuit Court of Appeals for the Second Circuit; and it is further

ORDERED, ADJUDGED AND DECREED, that the said decree of this Court, which was entered in the said consolidated cause on the 25th day of February, 1909, be, and the same hereby is reversed; that the first of these consolidated causes be, and the same hereby is, discontinued, and that the second of these consolidated causes be, and the same hereby is, remanded to the Supreme Court of the State of New York, whence it came, and that the injunction

which is contained in the said decree of this Court 175
be, and the same hereby is, dissolved; and it is further

ORDERED, ADJUDGED AND DECREED, that the complainant's bond which was heretofore filed in the office of the Clerk of this Court on said appeal to the United States Circuit Court of Appeals for the Second Circuit, be and the same hereby is, cancelled and discharged, and that the American Surety Company, of New York, the surety named in the said bond, be, and it hereby is discharged from any and all liability under said bond; and it is further

ORDERED, ADJUDGED AND DECREED, that the com- 176
plainant James Pollitz do have and recover of the defendant The Wabash Railroad Company the balance of said complainant's costs which remain due and unpaid, to wit, the sum of One Thousand Eight Hundred and twenty-four Dollars and thirty-six cents ($1,824.36), and that complainant have judgment and execution for said sum of One Thousand Eight Hundred and twenty-four Dollars and thirty-six cents ($1,824.36) against the said defendant The Wabash Railroad Company.

And it appearing that the defendant Metropolitan Trust Company duly demurred to the complaint and that such demurrer was sustained and judgment entered January 10, 1908, dismissing the com- 177
plaint as to said defendant which has not been appealed from or reversed,

ORDERED, ADJUDGED AND DECREED that this judgment remanding said cause to the Supreme Court of the State of New York shall not apply to said defendant Metropolitan Trust Company.

GEO. W. RAY,
U. S. Judge.

178 **Exhibit G.**

UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JAMES POLLITZ,
Plaintiff,
(Law 27),

vs.

THE WABASH RAILROAD COMPANY, EDWARD T. JEFFREY,
179 FREDERIC A. DELANO, EDGAR T. WELLES, JOHN C. OTTESON, ROBERT C. CLOWRY, ROBERT M. GALLAWAY, THOMAS H. HUBBARD, GEORGE J. GOULD, WINSLOW S. PIERCE, JOHN T. TERRY, JOSEPH J. SLOCUM, MERCANTILE TRUST COMPANY, UNITED STATES MORTGAGE AND TRUST COMPANY, HENRY EVANS, HENRY K. POMROY, GEORGE M. CUMMING, THE BOWLING GREEN TRUST COM-
180 PANY, J. C. VAN BLARCOM, JAMES B. FORGAN AND THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
Defendants.

GENTLEMEN:—Please to take notice that I shall move this Court, upon the annexed affidavit of STEPHEN M. YEAMAN and all the pleadings and proceedings had herein, at the call of the motion calendar thereof, in the United States Circuit Court Rooms,

in the Post Office Building, in the Borough of Manhattan in the City of New York, on Friday, the 25th day of March, 1910, for an order remanding this cause to the Supreme Court of the State of New York, as to the defendant, THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, and vacating the order and judgment entered in the office of the Clerk of this Court on the 10th day of January, 1908, in the consolidated cause wherein the above named complainant was complainant, and the above named defendant and others were defendants, in so far as the said order and judgment directs that the demurrer of The Metropolitan Trust Company of the City of New York be sustained, and also in so far as the said judgment and order directs that the bill of complaint be dismissed as to said last named defendant, and that I shall at the said time and place move this Court for a further order, reinstating said defendant, The Metropolitan Trust Company of the City of New York, as a defendant in this cause. 181 182

Dated New York, March 21st, 1910.

Yours, etc.,

STEPHEN M. YEAMAN,
Solicitor for Plaintiff,
15 William Street,
New York City.

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To

Messrs. PARSONS, CLOSSON & MCILVAINE,
Solicitors for Defendant, The Metropolitan
Trust Company of the City of New York,
52 William Street,
New York City.

THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
49 Wall Street,
New York City.

184 UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JAMES POLLITZ,
Plaintiff,
(Law 27)

vs.

THE WABASH RAILROAD COMPANY, EDWARD T. JEFFREY, FREDERIC A. DELANO, EDGAR T. WELLES, JOHN C. OTTE-
185 SON, ROBERT C. CLOWRY, ROBERT M. GALLAWAY, THOMAS H. HUBBARD, GEORGE J. GOULD, WINSLOW S. PIERCE, JOHN T. TERRY, JOSEPH J. SLOCUM, MERCANTILE TRUST COMPANY, UNITED STATES MORTGAGE AND TRUST COMPANY, HENRY EVANS, HENRY K. POMROY, GEORGE M. CUMMING, THE BOWLING GREEN TRUST COMPANY, J. C. VAN BLARCOM, JAMES B. FORGAN AND THE METROPOLITAN
186 TRUST COMPANY OF THE CITY OF NEW YORK,
Defendants.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

STEPHEN M. YEAMAN, being duly sworn, says:—

I am the solicitor for the complainant in the above entitled cause. This cause was commenced in the Supreme Court of the State of New York in January, 1907, and was removed to this court upon the

sole petition and the bond of the defendant, THE WABASH RAILROAD COMPANY. 187

A motion by the complainant to remand the cause was denied in February, 1907.

Thereafter the defendants, including THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, demurred to the Bill of Complaint and this demurrer was sustained as to the said trust company only, and an order was entered in December, 1907, thereon, dismissing said bill as to said defendant.

All the other defendants filed answers to the bill and thereafter the cause was brought on for final hearing and a final judgment was entered herein dismissing the Bill of Complaint. The complainant appealed to the Circuit Court of Appeals from the 188
said final judgment, alleging as error among other things the denial of the said motion of February 1907, and such proceedings were had upon the said appeal that thereafter and on or about the 1st day of March, 1910, a decree was entered in this court, pursuant to a mandate handed down by the Circuit Court of Appeals which decree among other things reversed the said final judgment of this court and remanded this cause to the Supreme Court of the State of New York whence it came.

The said defendant THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK was not a party to said proceedings in the Circuit Court of Appeals and the said decree remanded said cause to 189
the said state court only as to the other defendants.

The Circuit Court of Appeals, however, determined and adjudged that the federal court had no jurisdiction to hear and determine the issues herein, and that the other defendants in the same position as the said defendant trust company were proper and necessary parties, as more fully appears by the opinion of the Circuit Court of Appeals, copy of which is hereto annexed. The said opinion is as yet unreported. A mandate was thereupon handed down by said Circuit Court of Appeals reversing the decree of the Circuit Court, and remanding this

190 cause to the Supreme Court of the State of New York.

The proceedings taken in the two consolidated causes are set out in said opinion except the proceedings on the said demurrer of the said defendant trust company, and the proceedings since the rendition of said opinion; but the said defendant trust company was not a party to any of said subsequent proceedings.

The said defendant was not a party to the first cause of the consolidated causes, but was a party to the second thereof, wherein is the following prayer for relief as against it:

191 That the said defendant, The Metropolitan Trust Company of the City of New York, be ordered and adjudged to return to said Wabash Railroad Company, all of the bonds and common and preferred stock of the Wabash Railroad Company so received by it in exchange for $5,435,000 of said debenture bonds, and in default of being unable for any reason to so return the said bonds and stock, that it be adjudged and decreed to pay into the treasury of the said Wabash Railroad Company so much of the par value of such bonds and preferred and common stock so received by it in exchange for the said debenture bonds as may be found to exceed the actual market value of such debenture bonds
192 at the time the exchange was made.

The said defendant trust company occupies the same position as is occupied by the individual defendants in respect to its ownership and exchange of said debenture bonds.

STEPHEN M. YEAMAN.

Sworn to before me this 21st day of March, 1910.

CHAS. H. TOPPING,
Notary Public,
New York County,

[SEAL.]

UNITED STATES CIRCUIT COURT OF APPEALS 193

FOR THE SECOND CIRCUIT.

Before COXE, WARD and NOYES,
Circuit Judges.

JAMES POLLITZ,
Complainant-Appellant,

vs.

THE WABASH RAILROAD COMPANY *et al.*,
Defendants-Appellees.
(Consolidated Cause)

} Opinion. 194

WARD, *Circuit Judge:*

The complainant, a citizen of the State of New York, is the owner of 1,000 shares of the common stock of the Wabash Railroad Company, a consolidated corporation under the laws of Missouri, Ohio, Indiana, Michigan and Illinois, one of the defendants. The Railroad Company after long negotiations entered into an agreement with a committee 195
representing its debenture mortgage bondholders to exchange those bonds, aggregating $30,000,000, for bonds of a new issue, together with common and preferred stock aggregating a much larger sum.

October 20, 1906, this agreement was approved at a meeting of the stockholders and debenture mortgage bondholders by bondholders and stockholders representing more than 80 per cent. of the stock and debenture bonds of the Company, the complainant protesting against the plan as illegal and inequitable for various reasons not necessary to be stated.

196 October 30 the plan was advertised and holders of debenture mortgage bonds were invited to deposit them with the United States Mortgage & Trust Company of New York for exchange.

November 7 the complainant brought a suit in the Supreme Court of the State of New York, alleging that the plan was illegal and inequitable, against The Wabash Railroad Company, its resident officers and directors, the Mercantile Trust Company of New York, which was as registrar to countersign the new securities, The United States Mortgage & Trust Company of New York, which was as depositary of the securities to be exchanged to distribute the same and the persons composing the
197 committee of the debenture mortgage bondholders, praying that they might be enjoined from doing anything to carry out the plan.

December 5 the defendant Railroad Company removed the cause to the Circuit Court.

December 31 was fixed as the date for the distribution of the securities issued in exchange for the debenture mortgage bonds.

January 23, 1907, the complainant began a second suit in the Supreme Court of the State of New York against the same defendants in the first suit together with the trustees of the mortgage securing the new issue of bonds, and the Metropolitan Trust Company of New York, which had owned $5,435,-
198 000 of the debenture mortgage bonds alleging that the plan had been substantially carried out and praying that it might be declared illegal and void and that the defendants be ordered to re-exchange and re-deliver the securities or in default of so doing, that they or some of them be ordered to pay into the treasury of the defendant Railroad Company the par value of all the new bonds, common and preferred stock countersigned, issued, used or received by them in exchange for the debenture mortgage bonds, together with any interest paid on the new bonds in the meantime. The bill also set up as an additional reason for de-

claring the plan illegal Art. XII, Sec. 10 of the Con- 199
stitution of Missouri, providing that no corporation shall issue preferred stock without the consent of all stockholders.

January 25, 1908, the defendant Railroad Company removed this cause into the Circuit Court on the ground that there was a separable controversy between the complainant and the defendant Railroad Company, to the complete determination of which the other defendants were neither indispensable nor necessary parties.

February 21 an order was entered denying the complainant's motion to remand the cause to the State Court.

Subsequently, the complainant having moved for 200
leave to discontinue the first suit upon payment of costs and the defendant Railroad Company having moved to consolidate the two causes and for leave to amend its answer in the second cause and file a cross-bill, the Circuit Court denied the complainant's motion and granted the motions of the Railroad Company.

June 18 the Railroad Company amended its answer by setting up the new defense that the complainant was estopped from relying upon Art. XII, Sec. 10, of the Constitution of Missouri, and filed a cross-bill praying that he be enjoined from questioning in any other suit the validity of the plan of exchange or of the acts done in carrying it out.

201

The only question we need to consider is whether the motion to remand the second suit was properly denied. We do not agree with the learned Circuit Judge that there was a separable controversy between the complainant and the defendant Railroad Company to which the other resident defendants were not necessary parties. The bill charged them or some of them with confederating to carry out an illegal agreement *ultra vires* of the Company for their own benefit, and to the prejudice of the holders of common stock, and demanded that the original status be restored or in default thereof, that

202 they or some of them, pay into the treasury of the defendant Railroad Company the par value of the securities which they had issued or received, together with any interest paid upon the new bonds in the meantime. Only the bill is to be considered on this motion to remand, Graves *vs.* Corbin, 132 U. S., 571, 585, and we think it alleged a cause of action against the defendants jointly and that the complainant could not have the relief demanded without the presence of the resident defendants or some of them.

The Circuit Court would not have had jurisdiction of the cause if originally brought there, and therefore it is not removable, Act March 3, 1875, as
203 amended by Act of August 13, 1888. For these reasons the complainant's motions to remand the second cause and for leave to discontinue the first cause on payment of costs should have been granted and the defendant Railroad Company's motions to consolidate both causes and for leave to file a cross bill should have been denied, Boston Co. *vs.* Montana Co., 188 U. S., 632, 640; *ex parte* Wisner, 203 U. S., 449; Thord Wire Hedge Co., *vs.* Fuller, 122 U. S., 535: Torrence *vs.* Shedd, 144 U. S., 527; Ward *vs.* Franklin, 110 F. R., 794.

Decree reversed with direction to the Circuit Court to permit the complainant to discontinue the first cause on payment of costs accrued at the time
204 the motion was made and to remand the second cause to the Supreme Court of the State of New York, the costs to be paid by the defendant Railroad Company.

COXE, *C. J.*, dissents.

Exhibit H.

205

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JAMES POLLITZ,
Plaintiff,
(Law 27.)

AGAINST

THE WABASH RAILROAD COMPANY, EDWARD T. JEFFREY, FREDERIC A. DELANO, EDGAR T. WELLES, JOHN C. OTTESON, ROBERT C. CLOWRY, ROBERT M. GALLAWAY, THOMAS H. HUBBARD, GEORGE J. GOULD, WINSLOW S. PIERCE, JOHN T. TERRY, JOSEPH J. SLOCUM, MERCANTILE TRUST COMPANY, UNITED STATES MORTAGE AND TRUST COMPANY, HENRY EVANS, HENRY K. POMROY, GEORGE M. CUMMING, THE BOWLING GREEN TRUST COMPANY, J. C. VAN BLARCOM, JAMES B. FORGAN and the METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
Defendants.

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207

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, } ss.:

TOMPKINS MCILVAINE, being duly sworn, deposes and says:

I am an attorney-at-law and a member of the firm of Parsons, Closson & McIlvaine, which firm ap-

208 peared as solicitors for the defendant Metropolitan Trust Company. On the 21st day of March, 1910, a copy of a notice of motion, returnable on the 25th day of March, 1910, was left at said defendant's and another copy at deponent's office. Said notice of motion is signed by Stephen M. Yeaman, the solicitor who appeared for the plaintiff, and was accompanied by an affidavit of the said Stephen M. Yeaman, verified the 21st day of March, 1910. Deponent's firm refused to give any admission of service of said motion papers.

Deponent's firm does not appear generally on this motion, but merely specially for the purpose of this motion only and to object that the Court has no
209 power or jurisdiction to entertain this motion or to grant the relief asked.

The history of this case is as follows: The action, which is equitable in its nature, was begun in the Supreme Court of the State of New York, New York County, and was removed on petition of defendant Wabash Railroad Company to the Circuit Court of the United States for the Southern District of New York. A motion was then made by the complainant in said Circuit Court to remand the case to the State Court. This motion was made before Judge Lacombe and denied, an order to that effect being entered on or about February 23rd, 1907. Previous to the entering of this order, and on Feb-
210 ruary 4th, 1907, the defendant Metropolitan Trust Company had demurred to the Bill. The other defendants also demurred. The demurrers were heard before Judge Hazel on or about October 28, 1907, and all were overruled, except the demurrer of defendant Metropolitan Trust Company, which was sustained. A final decree sustaining the demurrer of defendant Metropolitan Trust Company and dismissing the Bill finally as to it, without leave to plaintiff to amend its Bill, was entered herein on the 10th day of January, 1908. No appeal from this decree was ever taken.

After the complainant's Bill was so dismissed as

to the defendant Metropolitan Trust Company, the 211
other defendants, whose demurrers had been overruled, answered, and after a hearing on the merits judgment against the complainant and in favor of the other defendants, who were still parties to the suit, was entered. From this judgment, to which the defendant Metropolitan Trust Company was in no way a party, the Bill having, as already said, been previously dismissed by a final decree as to it, the complainant appealed to the Circuit Court of Appeals. Complainant's petition on this appeal did not pray for an appeal from the order and judgment entered January 10th, 1908, sustaining the demurrer of the Metropolitan Trust Company and dismissing the Bill as to it, nor was any such appeal al- 212
lowed. Neither the said order of January 10th, 1908, nor the said demurrer of the Metropolitan Trust Company, was included in the record on appeal. No citation to the Metropolitan Trust Company was issued upon said appeal, nor was any notice thereof given to the Metropolitan Trust Company, nor service of any papers relating thereto made upon said Metropolitan Trust Company or its solicitors; nor was any bond given by the complainant upon said appeal in favor of the Metropolitan Trust Company from the time of the final decree.

Upon the hearing of said appeal of the complainant against the other defendants, to which said Metropolitan Trust Company was in no way a party, 213
the Circuit Court of Appeals directed the suit to be remanded to the State Court, and issued a mandate to the Circuit Court directing the Circuit Court to so remand. On the settlement of the order by the Circuit Court remanding the cause to the State Court, deponent called Judge Ray's attention to the above facts, and thereupon Judge Ray, in settling the order, dated February 28th, 1910, remanding the case to the State Court, added at the end thereof the provision:

> "And it appearing that the defendant Metro politan Trust Company duly demurred to the

214 complaint and that such demurrer was sustained and judgment entered January 10th, 1908, dismissing the complaint as to said defendant, which has not been appealed from and reversed,

ORDERED, ADJUDGED AND DECREED *that this judgment remanding said case to the Supreme Court of the State of New York shall not apply to the defendant Metropolitan Trust Company.*"

It is respectfully submitted that the Court has no power or jurisdiction to entertain the motion now made or to grant the relief asked.

TOMPKINS MCILVAINE.

Sworn to before me, this
29th day of March, 1910.
215

ANDREW WOELFEL,
[SEAL] Notary Public,
Richmond County,
Cert. filed in New York Co.

216

Exhibit I. 217

UNITED STATES CIRCUIT COURT

SOUTHERN DISTRICT OF NEW YORK.

JAMES POLLITZ,
Plaintiff,

AGAINST

THE WABASH RAILROAD COMPANY, EDWARD T. JEFFREY, FREDERIC A. DELANO, EDGAR T. WELLES, JOHN C. OTTESON, ROBERT C. CLOWRY, ROBERT M. GALLAWAY, THOMAS H. HUBBARD, GEORGE J. GOULD, WINSLOW S. PIERCE, JOHN T. TERRY, JOSEPH J. SLOCUM, MERCANTILE TRUST COMPANY, UNITED STATES MORTGAGE AND TRUST COMPANY, HENRY EVANS, HENRY K. POMROY, GEORGE M. CUMMING, THE BOWLING GREEN TRUST COMPANY, J. C. VAN BLARCOM, JAMES B. FORGAN and the METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
Defendants. 218 219

WARD, *Circuit Judge:*

The complainant moves to vacate an order sustaining the demurrer of the defendant The Metropolitan Trust Company of the City of New York, and a judgment dismissing the bill as to it; also to reinstate the Company as a defendant in the cause and remand it to the State Court.

220 The material facts are as follows: February, 1907, the complainant moved to remand the cause, which motion was denied. Thereafter all the defendants demurred to the bill. The demurrers were overruled except that of The Metropolitan Trust Company, the bill being dismissed as to it January 10, 1908. From this judgment the complainant took no appeal, and his time to do so has long since expired. Thereafter the other defendants filed answers and January 25th, 1909, final judgment was entered dismissing the bill of complaint. From this judgment the Complainant appealed to the Circuit Court of Appeals, which handed down a mandate directing the Circuit Court, among other things,
221 to remand the cause to the Supreme Court of the State of New York.

February 28, 1910 Judge Ray entered the order of the Circuit Court under the mandate against the defendants who were parties to the record on the appeal to the Circuit Court of Appeals, specially providing that it should not apply to the defendant The Metropolitan Trust Company.

It is true, as counsel for the Metropolitan Trust Company contend, that courts of the United States have no power to vacate or amend their own judgments for errors of law or fact after the term has passed, *Bronson* v. *Schulten*, 104 U. S. 410; *Phillips* v. *Negley*, 117 U. S. 665; but all courts have the in-
222 herent power to vacate at any time their own judgments rendered without jurisdiction, *Black on Judgments*, sec. 307; *Freeman on Judgments*, sec. 98; *Harris* v. *Hardeman*, 14 How. 334; *Kingsbury* v. *Buckner*, 134 U. S. 650; *Shuforth* v. *Cain*, 1 Abb. U. S. 302; *United States* v. *Wallace*, 46 F. R. 569; *Bruce* v. *Strickland*, 47 Ala. 192; *Baker* v. *Barclift*, 76 Ala. 414; *In re College Street*, 11 R. I. 472.

Under the ruling of the Circuit Court of Appeals the Circuit Court was without jurisdiction to render the judgment in question. It is too late for the Complainant to appeal from it and to allow it to stand and regulate the rights of the parties would

be an absurdity. It must be treated as a nullity and 223
I will grant the motion to vacate it.

If the Complainant thinks himself entitled to further relief he must apply to the judge who entered the order to remand. Motion to vacate the judgment granted.

April 7, 1910.

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Exhibit J.

At a Stated Term of the United States Circuit Court, held in and for the Southern District of New York, at the United States Court House and Post Office Building in the Borough of Manhattan, The City of New York, on the 15th day of April, 1910.

Present:

HON. HENRY GALBRAITH WARD,
Circuit Judge.

227 JAMES POLLITZ,
Complainant,

AGAINST

THE WABASH RAILROAD COMPANY, EDWARD T. JEFFREY, FREDERIC A. DELANO, EDGAR T. WELLES, JOHN C. OTTESON, ROBERT C. CLOWRY, ROBERT M. GALLAWAY, THOMAS H. HUBBARD, GEORGE J. GOULD, WINSLOW S. PIERCE, JOHN T. TERRY, JOSEPH J. SLOCUM,
228 MERCANTILE TRUST COMPANY, UNITED STATES MORTGAGE AND TRUST COMPANY, HENRY EVANS, HENRY K. POMROY, GEORGE M. CUMMING, THE BOWLING GREEN TRUST COMPANY, J. C. VAN BLARCOM, JAMES B. FORGAN and the METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK,
Defendants.

Complainant's motion to vacate and set aside the 229
judgment of this Court which sustained the demurrer of the defendant the Metropolitan Trust Company of the City of New York to the bill of complaint in this cause and dismissed said bill as to said defendant, and to remand this cause as to the defendant the Metropolitan Trust Company of the City of New York to the Supreme Court of the State of New York, on the ground that this Court had no jurisdiction, coming on to be heard, and upon reading the Judgment Roll upon the judgment dated January 10th, 1908, sustaining the demurrer of the Metropolitan Trust Company of the City of New York to the Bill herein, and dismissing said Bill as to said Metropolitan Trust Company of the City of 230
New York with costs, including therein the order of the Hon. E. Henry Lacombe denying the plaintiff's motion to remand the cause to the Supreme Court of the State of New York and the papers upon which the said order was granted; and upon reading the order, dated 28th February, 1910, of the Hon. George W. Ray, District Judge, sitting in the Circuit Court for the Southern District of New York, entered upon the mandate of the Circuit Court of Appeals for the Second Circuit, which order remanded the cause as to all of the defendants except the Metropolitan Trust Company of the City of New York to the Supreme Court of the State of New York; and upon said mandate of the said Circuit 231
Court of Appeals dated February 19th, 1910; and on reading and filing the affidavit of Stephen M. Yeaman, verified the 21st day of March, 1910, read in support of the motion, and the affidavit of Tompkins McIlvaine, verified the 29th day of March, 1910, read in opposition thereto, and after hearing J. Aspinwall Hodge, Esq., of counsel for complainant, for the motion, and Tompkins McIlvaine, appearing specially for the purposes of the motion only, on behalf of the defendant the Metropolitan Trust Company of the City of New York, to object to the jurisdiction of the Court to entertain the motion or

232 to make any order affecting the Metropolitan Trust Company of the City of New York, and due deliberation having been had, now on motion of Stephen M. Yeaman, solicitor for complainant, it is

ORDERED, That the order and judgment of this Court, which was entered in the office of the Clerk of this Court on the 10th day of January, 1908, and which, among other things, sustained the demurrer of the defendant, the Metropolitan Trust Company of the City of New York, to the complainant's bill of complaint in this cause, and dismissed the said bill of complaint as to said defendant the Metropolitan Trust Company of the City of New York, be and the same hereby is vacated and set aside in so
233 far as the said order and judgment sustains the said demurrer and dismisses the said bill as to the said defendant the Metropolitan Trust Company of the City of New York, upon the ground that the said order and judgment is void, this Court having never had any jurisdiction to enter the same, or to determine any of the issues of law or of fact herein; and it is further

ORDERED, that the motion to remand this cause as to the defendant the Metropolitan Trust Company of the City of New York to the Supreme Court of the State of New York be denied without prejudice, upon the ground that an application for such relief should more properly be made to the Judge of this
234 Court, who entered the order herein to remand this cause as to all the other defendants.

The motion for a stay of this order is also denied upon the ground that application for a stay should be made to the Judge of this court, remanding the cause if any order made or to be made by him shall deprive the Metropolitan Trust Co., of an opportunity to apply to the Supreme Court for relief against this order.

H. G. WARD,
J. U. S. Circuit Ct.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1909.

IN THE MATTER

OF

The Application of METROPOLITAN TRUST COMPANY of the City of New York for a Writ of Prohibition or, in the alternative, for a Writ of Mandamus directed to the Honorable HENRY G. WARD, Circuit Judge of the United States for the Second Circuit and for the Southern District of New York, and directed to the CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION AND FOR RULE.

Statement.

This is an application for leave to file a petition for a writ of prohibition or, in the alternative, for a writ of mandamus directed to the Hon. Henry G. Ward, one of the Circuit Judges of the Circuit Court of the United States in and for the

Southern District of New York, and the Circuit Court of the United States in and for the Second Circuit, prohibiting said Judge and Court from making or entering any order vacating a final judgment of the said Circuit Court entered January 10th, 1908, dismissing the bill of complaint of one James Pollitz against the petitioner, or commanding said Judge and Court to strike and expunge from the records of said Court any order that may be entered vacating said final judgment and to desist from exercising jurisdiction over the petitioner.

The history of this case is as follows:

The action was begun in the Supreme Court of the State of New York by one James Pollitz, a resident and citizen of said State, against the Wabash Railroad Company, an Ohio corporation, and others, including petitioner. The action was duly removed by the defendant The Wabash Railroad Company to the Circuit Court of the United States for the Southern District of New York, on the ground that a separable controversy existed between it and said Pollitz. A motion to remand to the State Court made by the plaintiff was denied by Judge Lacombe, by an order entered February 21st, 1907, on the ground that a separable controversy between the plaintiff and the said Wabash Railroad Company did exist. Thereafter plaintiff applied to this Court for a writ of mandamus commanding Judge Lacombe to remand the cause to the State Court. The petition for said writ was dismissed by this Court. (*In re* Pollitz, 206 U. S., 323).

Previous to Judge Lacombe's order denying plaintiff's motion to remand and on February 4th, 1907, petitioner and the other defendants demurred to the bill of complaint. The demurrers were heard on October 8th, 1907, the demurrer of petitioner being sustained and the others being all overruled.

A final decree sustaining the demurrer of petitioner and dismissing the bill of complaint finally as to it was entered on the 10th day of January, 1908. No appeal from this final decree was ever taken and, since its entry, petitioner has in no way been concerned in the action.

After the bill was finally dismissed as to your petitioner by said decree of January 10th, 1908, the other defendants whose demurrers had been overruled answered, and after a hearing on the merits final decree against plaintiff and in favor of the other defendants was entered on or about the 23rd day of February, 1909. From this decree on the merits,—to which petitioner was in no way a party, the bill, as already said, having been previously dismissed as to it by the final decree of January 10th, 1908,—plaintiff appealed to the Circuit Court of Appeals. Neither the demurrer of the petitioner nor said decree of January 10th, 1908, dismissing the bill of complaint as against the petitioner, was included in the record on appeal. No bond was given to the petitioner on appeal, and no citation was issued to the petitioner, nor was any notice of the appeal given to the petitioner, nor was service of any paper relating to the appeal made upon the petitioner or its solicitors, and the petitioner was in no way a party to such appeal.

Upon the hearing of said appeal, the Circuit Court of Appeals directed the suit before it, —that is the suit between plaintiff and the other defendants exclusive of petitioner,—to be remanded on the ground that the bill of complaint did not, in its opinion, disclose a removable separable controversy, and issued a mandate to the Circuit Court to that effect.

Acting under said mandate, the Circuit Court, Judge Ray presiding, entered on February 28th, 1910, an order remanding the case to the State

Court, inserting a provision to the effect that as it appeared that petitioner was not a party to the appeal, the order should not apply to petitioner. The provision in question is as follows:

> "It appearing that the defendant Metropolitan Trust Company duly demurred to the complaint and that such demurrer was sustained and that judgment was entered January 10th, 1908, dismissing the complaint as to said defendant which has not been appealed from or reversed,
>
> ORDERED, ADJUDGED AND DECREED that this judgment remanding this cause to the Supreme Court of the State of New York shall not apply to the defendant Metropolitan Trust Company."

Thereafter, although the terms at which were rendered said final decree of January 10th, 1908, dismissing the bill as to petitioner and the decree of February 23rd, 1909, dismissing the bill as to the other defendants, had expired, as had also the time to appeal from said decrees, the plaintiff undertook to serve a so-called notice of motion upon petitioner and its former solicitor, asking for an order vacating said final judgment of January 10th, 1908, reinstating petitioner as a party defendant and remanding the cause as to it to the State Court.

At the hearing upon said so-called motion the petitioner appeared specially for the sole purpose of objecting to the jurisdiction and power of the Circuit Court to entertain any motion or to make any order affecting the rights of petitioner as finally adjudicated by said judgment or decree of January 10th, 1908, as the term at which said judgment was entered had long since expired and no appeal therefrom had been taken and that the time within which an appeal could be taken from said judgment as to petitioner had also expired and

petitioner had been discharged from further attendance.

The learned Circuit Judge held, however, that, though it was true, as contended by petitioner, "that courts of the United States have no power to vacate or amend their own judgments for errors of law or fact after the term is passed," that "all courts have the inherent power to vacate at any time their own judgments rendered without jurisdiction;" and further that "under the ruling of the Circuit Court of Appeals the Circuit Court was without jurisdiction to render the judgment in question" (which ruling was made by the Circuit Court of Appeals on the appeal from the judgment in favor of the other defendants, to which judgment and said appeal therefrom the petitioner was not a party). The learned Judge further said, "It is too late for the complainant to appeal from it" (*i. e.*, said judgment of January 10, 1908, dismissing the bill of complaint as to the petitioner) "and to allow it to stand and regulate the rights of the parties would be an absurdity. It must be treated as a nullity and I will grant the motion to vacate it."

An order upon said decision of said learned Judge was entered April 15, 1910, which purports to vacate said judgment upon the ground that said "judgment is void."

POINT I.

It appears upon the face of the record that the Circuit Court was without power or jurisdiction to enter any order affecting the rights of your petitioner under the final judgment dismissing the bill and suit as to it, dated January 10th, 1908, the term at which said judgment was rendered having expired.

This proposition is elementary and was conceded by the Circuit Judge himself in his opinion.

Ayres v. *Wiswall,* 112 U. S., 187.

In this case the Court unanimously said (p. 190):

> The Circuit Court retained its power over the suit and the parties *until the end of the term at which the final decree was rendered.* The parties were not in law discharged from their attendance in the cause until the close of the term and the decree though entered was in the breast of the court until the final adjournment. (Citing cases.) . . . The order to remand can be made at *any* time *during the pendency* of the cause when it shall appear there is no jurisdiction."

In the case of *Bronson* v. *Schulten,* 104 U. S., 410, the control of the Circuit Court over its own final judgments is fully determined and the authorities reviewed at length. The case holds that a motion to review a final decree of the Circuit Court for errors of fact or law cannot be made after the expiration of the term at which it was entered, except in cases in which the writ *coram vobis* was allowed,

saying that this writ was limited to cases where one of the

> "parties to the judgment had died before it was rendered or was an infant and no guardian had appeared or been appointed or was a *femme covert* and the like, or error in the process through default of the clerk."

The Court referred to Rolle's Abridgement, p. 749, where it was said:

> "that if the error be in the judgment itself a writ of error does not lie in the same but in another and superior court."

See, also:

Cameron *v.* McRoberts, 3 Wheaton, 590.

Phillips *v.* Negley, 117 U. S., 665.

Wetmore *v.* Karrick, 205 U. S., 141.

POINT II.

Whether the Circuit Court has any inherent power to at any time vacate a judgment for want of jurisdiction to enter it is immaterial in this case, since it appears on the face of the record that diversity of citizenship existed between the plaintiff and the removing defendant who asserted that a separable, removable controversy existed between them. The determination of whether such controversy existed was a justiciable question to be decided by the Circuit Court. The Circuit Court, in the exercise of its

proper jurisdiction, did determine that such a controversy existed, which determination, being unmodified and unreversed, as against the petitioner, is binding and conclusive as to it and cannot be treated as a nullity.

It appears on the face of the record that the plaintiff is a citizen of New York and that The Wabash Railroad Company is an Ohio corporation, and that by a proper petition and bond and the filing of the transcript of the record in the Circuit Court, the case was duly removed thereto, on the ground that a removable separable controversy existed between plaintiff and said Railroad Company. Thereupon plaintiff moved to remand to the State Court on the ground that the bill of complaint disclosed no such separable controversy between him and said Railroad Company. Judge Lacombe, in the exercise of his proper jurisdiction, determined by his order of February 21st, 1907, that such controversy did exist, which order was made before the judgment of January 10th, 1908, dismissing the bill of complaint as to petitioner, was entered. This order denying the motion to remand has never been modified or reversed as to petitioner, either by any application made before the expiration of the term at which final judgment was entered, or by any appeal to which petitioner was a party. It is true that an appeal was taken, but said appeal was not taken from the judgment dismissing the bill of complaint as to the petitioner, but only from the judgment dismissing the bill as to the other defendants, to which last named judgment and said appeal petitioner was not a party.

The plaintiff, not having chosen to endeavor to vacate the petitioner's final judgment at the proper

term or to take as against petitioner the appeal allowed by law, elected to permit Circuit Judge Lacombe's order, denying the motion to remand, to become a final adjudication as to petitioner, upon the rightfulness of the removal of the cause into the Circuit Court and the jurisdiction of the Circuit Court to enter the petitioner's final judgment.

Even if Judge Lacombe's order denying plaintiff's motion to remand was erroneous, so long as it remains unreversed by an Appellate Court, it cannot be attacked collaterally or otherwise after the expiration of the term on the assertion that it is a nullity or rendered without jurisdiction.

This Court said *In re Winn*, 213 U. S., 458, at page 468:

> "Where the removability of a case turned upon the question whether there was a separable controversy to the trial of which certain of the defendants were not indispensable or necessary parties, it was held that the Circuit Court had jurisdiction to determine the question of separability."

And in this case the Court distinguished, at page 468, cases, such as *Ex parte Nebraska*, 209 U. S., 436, where it appeared on the face of the record that absolutely no jurisdiction had attached.

In *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S., 207, the Court said of a judgment of the Circuit Court, attacked in the State Court as void for want of jurisdiction (p. 220):

> "Such judgment, *until reversed by a proper proceeding* in this Court, is binding upon the parties."

And again (p. 220):

> " 'Whether in such a case the suit could be removed was a question for the Circuit Court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded . . . its final de-

> cree in the suit could have been reversed on appeal as erroneous, *but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court.* The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. *Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal.'"*

And further (p. 221):

> "It was held in this Court that even if the Federal Court erred in assuming or retaining jurisdiction of the suit, *its decree being unmodified and unreversed, could not be treated as a nullity."*

And again (p. 221):

> " 'Even if that Court (Circuit Court) erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them, or either of them, collaterally, or otherwise than on writ of error or appeal to this Court.' "
>
> (p. 222): "It is not necessary to determine whether the case was removable or not. *The Federal Court was given jurisdiction to determine that question,* it did determine it, and its judgment was conclusive upon the parties before it, until reversed by a proper proceeding in this Court. . . . The action proceeded in the State Court evidently *upon the theory that the judgment of the Federal Court was a nullity* if it had erred in taking jurisdiction. For the reasons stated we think *this hypothesis is not maintainable."*

See, also:

Skillern's Executors v. *May's Executors,* 6 Cranch, 266.

McCormick v. *Sullivant*, 10 Wheaton, 192.
Des Moines Navigation Co. v. *Iowa Homestead Co.*, 123 U. S., 552.
Dowell v. *Applegate*, 152 U. S., 327.
In re Pollitz, 206 U. S., 323.

POINT III.

Where plainly and on the face of the record the Circuit Court is assuming to act beyond its power and jurisdiction, prohibition or mandamus is an appropriate remedy for one who has objected to the jurisdiction improperly assumed to be exercised.

It is respectfully submitted that it has already been shown that the Circuit Court on the face of the record was without jurisdiction to vacate the judgment of January 10th, 1908, dismissing the bill of complaint as to petitioner.

Either the writ of prohibition or mandamus seems proper upon the facts here disclosed.

(*a*) *The Writ of Prohibition:*

The following cases hold that where the Circuit Court is plainly acting without jurisdiction, the party who has objected is entitled to a writ of prohibition as a matter of right, though where there is another remedy by way of appeal or writ of error and the question of jurisdiction is doubtful, the granting of the writ is discretionary.

In *In re Huguley Mfg. Co.*, 184 U. S., 297, 301, the Chief Justice said:

> "It is firmly established that where it appears that a court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful or depends on facts which are not made matter of record, the granting or refusal of the writ is discretionary."

See, also:

Smith v. *Whitney*, 116 U. S., 167.
In re Rice, 155 U. S., 396.
In re Chetwood, 165 U. S., 443.
Ex parte Joins, 191 U. S., 93.

(*b*) *The Writ of Mandamus:*

It is also well established by this Court that where on the record it is clear as a matter of law that the Circuit Court is assuming to act wholly without jurisdiction, a writ of mandamus lies.

In the case of *In re Winn*, 213 U. S., 458, Mr. Justice Moody, speaking for this Court, said (p. 468):

> "It is only in *cases where the record makes it clear as a matter of law that the Circuit Court is without jurisdiction* to take any action whatever *that the writ of mandamus lies.* This distinction has been acted on many times by this court and it is enough to refer to two very recent cases. Thus, where the removability of a case turned upon the question whether there was a separable controversy to the trial of which certain of the defendants were not indispensable or necessary parties, it was held that the Circuit Court had jurisdiction to determine the question of separability. . . .

> As we have shown, the want of jurisdiction of the Circuit Court appears clearly on the record in the case at bar, and does not, as in *In Re Pollitz* and *Ex Parte Nebraska*, depend upon findings of fact which the Circuit Court had jurisdiction to make. We think, therefore, it is clear that the writ of mandamus ought to issue."

In each of the cases referred to by Mr. Justice Moody, the distinction was made between it and a case where on the face of the record absolutely no jurisdiction has attached and the right to a writ of mandamus in the latter case was affirmed.

See, also:

Ex parte Bradley, 7 Wall., 364;
Virginia v. *Rives*, 100 U. S., 313;
Virginia v. *Paul*, 148 U. S., 107;
Kentucky v. *Powers*, 201 U. S., 1;
Ex parte Wisner, 203 U. S., 449;
Re Metropolitan Ry. Receivership, 208 U. S., 90;
Matter of Dunn, 212 U. S., 374.

POINT IV.

In conclusion, it is respectfully submitted that as, on the face of the Record and as a matter of law, the Circuit Court is plainly assuming to act wholly without jurisdiction, and as petitioner has no remedy, certainly no clear, adequate remedy, except by a writ of this Court, such writ should be granted.

Washington, April 18th, 1910.

Respectfully submitted,

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of the City of New York,
52 William Street,
Borough of Manhattan,
City of New York.

TOMPKINS MCILVAINE,
Of Counsel.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1909.

IN THE MATTER

OF

The Application of METROPOLITAN TRUST COMPANY of the City of New York for a Writ of Prohibition or, in the alternative, for a Writ of Mandamus directed to the Honorable HENRY G. WARD, Circuit Judge of the United States for the Second Circuit and for the Southern District of New York, and directed to the CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF IN SUPPORT OF APPLICATION.

Statement.

This is an application under a rule granted by this Court on April 25th, 1910, directing the Hon. Henry G. Ward, one of the Circuit Judges of the Circuit Court of the United States in and for the Southern District of New York, and the Cir-

cuit Court of the United States in and for the Southern District of New York, to show cause why a writ of mandamus should not issue commanding said Judge and Court to strike and expunge from the records of said Court an order dated April 15th, 1910, of said Circuit Court made by said Judge, vacating a decree or judgment of said Court, entered January 10th, 1908, which dismissed the bill of complaint of one James Pollitz against the petitioner, and to desist from exercising jurisdiction over the petitioner.

The history of this case is as follows:

The action, which is of an equitable nature, was begun in the Supreme Court of the State of New York, by one James Pollitz, a resident and citizen of the State of New York, against The Wabash Railroad Company, an Ohio corporation, the petitioner and others, many of whom, including petitioner, were residents of said State of New York. The action was duly removed by the defendant The Wabash Railroad Company to the Circuit Court of the United States for the Southern District of New York, on the ground that a separable controversy existed between said Railroad Company and said Pollitz.

A motion to remand to the State Court made by the plaintiff was denied by Judge Lacombe, by an order entered February 21st, 1907 (page 44, fols. 130-134 of the Petition), on the ground, as determined by said Judge, that a separable controversy between the plaintiff and the said Wabash Railroad Company did exist. Thereafter plaintiff applied to this Court for a writ of mandamus commanding Judge Lacombe to remand the cause to the State Court. The petition for said writ was dismissed by this Court. (*In re* Pollitz, 206 U. S., 323.)

Previous to Judge Lacombe's order denying plaintiff's motion to remand and on February 4th,

1907, petitioner demurred (page 46, fols. 136-144 of the Petition), to the bill of complaint on the ground, among others, that the bill exhibited no cause of action against petitioner. The other defendants also demurred. *After* Judge Lacombe's order refusing to remand was entered and on October 8th, 1907, argument on the said demurrers was heard, the demurrer of the petitioner being sustained and the demurrers of all the other defendants being overruled. A decree sustaining the demurrer of petitioner and dismissing the bill of complaint as to it was entered by the Circuit Court on the 10th day of January, 1908 (page 49, fols. 145-153 of the Petition). Since the entry of this decree or judgment, petitioner has in no way been concerned or taken any part in the action.

After the bill was thus dismissed as to petitioner by said decree or judgment of January 10th, 1908, the other defendants whose demurrers had been overruled answered, and, after the taking of evidence and a hearing, a decree or judgment dismissing the bill of complaint on the merits as to all of said other defendants was entered by the Circuit Court on the 23rd day of February, 1909 (page 154, fols. 154-165 of the Petition). To said decree of January 23rd, 1909, dismissing the bill as to the other defendants, petitioner was in no way a party, —in fact, said decree does not even refer to the decree of January 10th, 1908, dismissing the bill as to petitioner.

No appeal in which plaintiff sought to review the decree of January 10th, 1908, dismissing the bill of complaint as to petitioner, has ever been prayed or allowed, though from the decree of February 23rd, 1909, dismissing the bill on the merits as to the other defendants, the plaintiff took a so-called appeal to the Circuit Court of Appeals. But in this so-called appeal neither the demurrer of the petitioner nor its said decree of January 10th, 1908,

dismissing the bill as to it, was included in the record on appeal; no bond on appeal was given to the petitioner and no citation was issued to the petitioner; nor was any notice of the appeal given to the petitioner, nor was the making of said decree of January 10th, 1908, dismissing the bill as to petitioner, assigned as error in plaintiff's assignment of errors (fols. 205-215 of the Petition). In short, neither the petitioner nor its solicitors were in any way concerned in said appeal nor served with any paper relating thereto. In no way whatever, therefore, has the plaintiff ever sought to review on appeal petitioner's decree of January 10th, 1908, or to review as to petitioner the jurisdiction of the Circuit Court to render said decree dismissing the bill as to it.

Upon the hearing of the said so-called appeal from the decree of February 23rd, 1909, dismissing the bill on the merits as to the other defendants (in which appeal as already said, neither the petitioner nor its said decree of January 10th, 1908, were in any way concerned or affected), the Circuit Court of Appeals directed the case before it—that is, the case between the plaintiff and the other defendants exclusive of petitioner—to be remanded, on the ground that the bill of complaint did not, in the opinion of the Circuit Court of Appeals, disclose a separable and removable controversy, and issued a mandate to the Circuit Court to that effect.

Acting under said mandate, the Circuit Court, Judge Ray presiding, entered on February 28th, 1910, an order remanding the case to the State Court, inserting a provision to the effect that as it appeared that petitioner was not a party to the appeal, the order should not apply to petitioner. The provision in question is as follows (page 59, fol. 177 of the Petition):

> "It appearing that the defendant Metropolitan Trust Company duly demurred to

the complaint and that such demurrer was sustained and that judgment was entered January 10th, 1908, dismissing the complaint as to said defendant which has not been appealed from or reversed,

ORDERED, ADJUDGED AND DECREED that this judgment remanding this cause to the Supreme Court of the State of New York shall not apply to the defendant Metropolitan Trust Company."

Thereafter and on or about March 21st, 1910 (page 60, fols. 178-183 of the petition), though petitioner had been discharged from further attendance in the Circuit Court, *and though there had long expired the terms at which were rendered the decree of January 10th, 1908, dismissing the bill as to petitioner, and the decree of January 23rd, 1909, dismissing the bill on the merits as to the other defendants*, the plaintiff undertook to serve a so-called notice of motion upon petitioner and its former solicitors, asking for an order vacating said decree of January 10th, 1908, reinstating petitioner as a party defendant and remanding the case as to petitioner to the State Court.

At the hearing upon said so-called motion, the petitioner appeared specially for the sole purpose of objecting to the jurisdiction and power of the Circuit Court to entertain the motion or to make any order affecting the rights of petitioner as adjudicated by said decree or judgment of January 10th, 1908.

The learned Circuit Judge held (page 74, fols. 222-223 of the petition), however, that, though it was true, as contended by petitioner, "that courts of the United States have no power to vacate or amend their own judgments for errors of law or fact after the term is passed," that "all courts have the inherent power to vacate at any time their own judgments rendered *without juris-*

diction;" and further that "under the *ruling of the Circuit Court of Appeals* the *Circuit Court was without jurisdiction* to render the judgment in question" (which ruling was made by the Circuit Court of Appeals on the appeal from the judgment in favor of the other defendants, to which judgment and said appeal therefrom the petitioner, as already said, was not a party). The learned Judge further said, *"It is too late for the complainant to appeal from it"* (*i. e.,* said judgment of January 10, 1908, dismissing the bill of complaint as to the petitioner), *"and to allow it to stand and regulate the rights of the parties would be an absurdity.* It *must* be treated as a *nullity* and I will grant the motion to vacate it."

Thereupon an order upon said decision of said learned Judge was entered April 15, 1910, which purports to vacate said decree or judgment of January 10th, 1908, upon the ground that said "judgment is void" (page 76, fols. 226-234 of the petition).

POINT I.

It appearing upon the face of the record that the decree of January 10, 1908, dismissing the bill of complaint as to petitioner, became final at a term of court long since expired, and no appeal to review said decree having been ever prayed or allowed, the Circuit Court was plainly without power or jurisdiction to make an order vacating said decree which

had thus become final, or affecting the rights thereby vested in the petitioner.

The decree sustaining the demurrer of the petitioner and dismissing the bill as to it was entered January 10, 1908 (fols. 145-153 of petition), and the decree dismissing the bill on the merits as to the other defendants was entered February 23, 1909 (fols. 154-165 of petition).

The motion to vacate said decree of January 10, 1908, was made March 21, 1910 (fols. 178-183 of the petition), more than two years after the entry of petitioner's decree, and more than one year after the entry of the decree dismissing the bill on the merits as to the other defendants, and so long after the expiration of the terms at which said decrees or judgments were entered.

The proposition that a Circuit Court of the United States has no power to vacate or amend its own judgment for errors of law or fact after the term is passed, is elementary, and indeed was conceded by the learned Judge himself. He said (page 74, *fol. 221* of petition):

> "It is true as counsel for the Metropolitan Trust Company contend that courts of the United States have no power to vacate or amend their own judgments for errors of law or fact after the term has passed."

In the case of *Ayres* v. *Wiswall,* 112 U. S., 187, this Court unanimously said (p. 190):

> "The Circuit Court retained its power over the suit and the parties *until the end of the term at which the final decree was rendered.* The parties were not in law discharged from their attendance in the cause until the close of the term and the decree though entered was in the breast of the court until the final adjournment."

In the case of *Bronson* v. *Schulten*, 104 U. S., 410, the control of the Circuit Court over its own final judgments is fully determined and the authorities reviewed at length. The case holds that a motion to review a final decree of the Circuit Court for errors of fact or law cannot be made after the expiration of the term at which it was entered, except in cases in which the writ *coram vobis* was allowed, saying that this writ was limited to cases where one of the

> "parties to the judgment had died before it was rendered or was an infant and no guardian had appeared or been appointed or was a *femme covert* and the like, or error in the process through default of the clerk."

The Court referred to Rolle's Abridgement, p. 749, where it was said:

> "that if the error be in the judgment itself a writ of error does not lie in the same but in another and superior court."

See, also:

Cameron *v.* McRoberts, 3 Wheaton, 590.

Phillips *v.* Negley, 117 U. S., 665.

Wetmore *v.* Karrick, 205 U. S., 141, at page 149, last complete paragraph.

In PICKETT *v.* LEGERWOOD, 7 Peters, 142, this Court said, at page 147:

> "It cannot be questioned, that the appropriate use of the writ of error *coram vobis* is, to enable a court to correct its own errors—those errors which precede the rendition of judgment. In practice the same end is now generally attained by motion.
>
> . . .
>
> "The cases for which error *coram vobis* are enumerated without any material variation in all the books of practice, and rest on the authority of the sages and fathers of the

law. I will refer to the pages of Archbold, for the following enumeration (1st Vol., 234, 276/9.) 'Error in the process, or through default of the clerk; error in fact, as, where the defendant, being under age, sued by attorney, in any other action but ejectment; that either plaintiff or defendant was a married woman, at the commencement of the suit; or died before verdict or interlocutory judgment, and the like.' But all the books concur in quoting the language of Rolle's Abridgment, p. 749, 'that if error be in the judgment itself, and not in the process, a writ of error does not lie in the same court, but must be brought in another and superior court.' "

It is not necessary to refer to all the authorities, but it is sufficient to say that the foregoing rule is well established by this Court, and that none of its decisions will, on careful examination, be found in conflict therewith.

POINT II.

Whether any Court has inherent power to at any time vacate a judgment as void for want of jurisdiction ***is immaterial in this case,*** **it plainly appearing as a matter of law on the face of the record that the Circuit Court** ***had*** **jurisdiction to determine whether a separable removable controversy existed between the plaintiff and the removing defendant, and that in the exercise of its rightful jurisdiction, said Court did deter-**

mine that such a controversy existed; which determination being unmodified and unreversed *as to petitioner* by any Appellate Court, is final, conclusive and *res adjudicata*.

It appears on the face of the record that the plaintiff is a citizen of New York and that The Wabash Railroad Company is an Ohio corporation, and that by a proper petition and bond and the filing of the transcript of the record in the Circuit Court, the case was duly removed thereto, on the ground that a removable separable controversy existed between plaintiff and said Railroad Company.

Thereafter plaintiff moved before Judge Lacombe to remand to the State Court on the ground that the bill of complaint disclosed no such separable controversy between him and said Railroad Company. Thereupon Judge Lacombe, in the exercie of his rightful jurisdiction, decided that such a controversy did exist (see Judge Lacombe's order, p. 44, fols. 130-134, of the petition), and his order of February 21st, 1907, was entered. Said order was made before the decree of January 10th, 1908, dismissing the bill of complaint as to petitioner, was entered.

The order denying the motion to remand has, as already said, never been modified or reversed as to petitioner. It is true that a *so-called appeal was taken, but said so-called appeal was not from the judgment dismissing the bill of complaint as to the petitioner, but only from the judgment dismissing the bill as to the other defendants,* to which last named judgment and said appeal petitioner was not a party.

When the decree or judgment of Feb. 23, 1909 (fols. 154-165 of the petition), dismissing the bill on the merits as to all the defendants except the

petitioner was entered, the petitioner's judgment of Jan. 10, 1908, dismissing the bill as to it, became, even if it were not so before, "final" and appealable; these two judgments together then at least constituted the "*final decision,*" which is made appealable by Section 6 of the Judiciary Act of March 3, 1891 (Mendenhall *v.* Hall, 134 U. S., 559; Hohorst *v.* Hamburg American Packet Co., 148 U. S., 262; *In re* Hohorst, 150 U. S., 653.

The plaintiff, not having chosen to endeavor to vacate the petitioner's decree at the proper term or to take as against petitioner the appeal allowed by law, *elected to permit Circuit Judge Lacombe's order, denying the motion to remand,* to *become a final adjudication as to petitioner,* upon the rightfulness of the removal of the cause into the Circuit Court and upon the question of the jurisdiction of the Circuit Court to enter the petitioner's said decree.

Even if Judge Lacombe's order denying plaintiff's motion to remand on the ground that a separable controversy existed might, as to petitioner, on a proper appeal to which petitioner had been made a party, have been held to be erroneous, in the absence of any such appeal, the subsequent decree or judgment entered in pursuance of the jurisdiction by said order determined to exist, is final, conclusive and *res adjudicata;* and petitioner's said judgment cannot now be attacked collaterally or otherwise on the assertion that said judgment is a nullity or entered without jurisdiction.

It is well settled that the question whether there is a separable controversy between parties as to whom there is the requisite diversity of citizenship is a justiciable question that it is the province of the Circuit Court to determine. The Circuit Court's determination on that point may on appeal be held to be error, but, like any other judicial de-

cision on a question of law or fact which the Court has power to determine, it is *res adjudicata* until set aside or reversed by a proper proceeding.

In this very case, on an application by plaintiff to this Court for a writ of mandamus to compel the Circuit Judge to remind the case to the State Court (*In re James Pollitz*, 206, U. S., 323), this Court in denying the application for such writ in effect held that the Circuit Court had jurisdiction to determine whether a separable controversy existed.

This Court said in *In Re Winn*, (213 U. S., 458, at page 468):

> "Where the removability of a case turned upon the question whether there was a separable controversy to the trial of which certain of the defendants were not indispensable or necessary parties, it was held that the Circuit Court had jurisdiction to determine the question of separability; . . . *In re* James Pollitz, 206 U. S., 323. The same point was decided in *Ex Parte* Nebraska, 209 U. S., 436. In each of these cases a distinction was made between it and a case where on the face of the record absolutely no jurisdiction has attached, and the right to a writ of mandamus in the latter case was affirmed.
>
> As we have shown, the want of jurisdiction of the Circuit Court appears clearly on the record in the case at bar, and does not, as in *In Re* Pollitz and *Ex Parte* Nebraska, depend upon findings of fact which the Circuit Court had jurisdiction to make. We think, therefore, it is clear that the writ of mandamus ought to issue."

In *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S., 207, the Court said of a judgment of the Circuit Court, attacked in the State Court as void for want of jurisdiction (p. 220):

> "Such judgment, *until reversed by a proper proceeding* in this Court, is binding upon the parties."

And again (p. 220):

"'Whether in such a case the suit could be removed was a question for the Circuit Court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded . . . its final decree in the suit could have been reversed on appeal as erroneous, *but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not, was certainly within the power of the Circuit Court.* The decision of that question was the exercise and the rightful exercise of jurisdiction, no matter whether in favor of or against taking the cause. *Whether its decision was right, in this or any other respect, was to be finally determined by this court on appeal.*'"

And further (p. 221):

"It was held in this Court that even if the Federal Court erred in assuming or retaining jurisdiction of the suit, *its decree being unmodified and unreversed, could not be treated as a nullity.*"

And (p. 221):

"'Even if that Court (Circuit Court) erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them, or either of them, collaterally, or otherwise than on writ of error or appeal to this Court.'"

(p. 222): "It is not necessary to determine whether the case was removable or not. *The Federal Court was given jurisdiction to determine that question,* it did determine it, and its judgment was conclusive upon the parties before it, until reversed by a proper proceeding in this Court. . . . The action proceeded in the State Court evidently *upon the theory that the judgment of the Federal Court was a nullity* if it had erred in taking jurisdiction. For the reasons stated we think *this hypothesis is not maintainable.*"

See, also:

Skillern's Executors v. *May's Executors,* 6 Cranch, 266.

McCormick v. *Sullivant,* 10 Wheaton, 192.

Des Moines Navigation Co. v. *Iowa Homestead Co.,* 123 U. S., 552.

Dowell v. *Applegate,* 152 U. S., 327.

In a recent case in the Circuit Court of Appeals for the Sixth Circuit, Mr. Justice Lurton delivering the opinion of that Court in *Loeser* v. *Savings Deposit Bank,* 163 Fed. Rep., 212, referred to *Black on Judgments,* Sections 306-7, cited by the learned Judge below, and pointed out that such authorities have no application to a case like the one at Bar.

Mr. Justice Lurton, after quoting the rule stated in *Bronson* v. *Schulten,* that final judgments of the Circuit Court could not be modified or vacated after the expiration of the Term at which they were rendered, said:

> (p. 214): "When the power of this Court to expunge one of its judgments is invoked upon the ground of its utter nullity, every presumption in favor of the judgment, which does not contradict the record, must be indulged. Limited as is the jurisdiction of the inferior *nisi prius* courts of the United States and subject to a presumption against jurisdiction throughout the progress of a cause, yet the judgments of these tribunals are not nullities, although jurisdiction is not shown upon the record. Such judgments are, although jurisdiction is not apparent, binding upon the parties, and such apparent want of jurisdiction is available only in some form of review by a superior court." (Citing cases.)

In this case not only has there expired the term at which was entered the decree of January 10th, 1908, dismissing the bill as to petitioner, but there

has also expired the term at which was entered the decree of February 23, 1909, dismissing the bill on the merits as to the other defendants.

It is unnecessary to refer at length to the class of authorities cited by the learned Judge below in his opinion (see p. 74, fols. 221-2 of Petition for Writ of Mandamus). None of such authorities support the proposition that a judgment of the Circuit Court in a case in which said Court has determined that a separable removable controversy existed between parties who were admittedly citizens of different States, can be treated as void for want of jurisdiction and be vacated after the expiration of the term at which final judgment was entered.

All of the authorities cited under this Point, except *Loeser* v. *Savings Deposit Bank,* were brought to the attention of the Circuit Judge, but were not regarded as controlling, evidently on the theory that want of jurisdiction in the Circuit Court to render the judgment was established as against the petitioner by the decision of the Circuit Court of Appeals; for in his opinion the Circuit Judge says:

> "Under the ruling of the Circuit Court of Appeals the Circuit Court was without jurisdiction to render the judgment in question (that is, the petitioner's judgment)." * * * "It must be treated as a nullity, and I will grant the motion to vacate it."

It seems clear that the decision of the Circuit Court of Appeals cannot be given the effect attributed to it by the learned Judge.

Whether the Circuit Court of Appeals on the so-called appeal from the decree dismissing the bill on the merits as to the other defendants, to which appeal the petitioner was not a party and in which appeal petitioner's decree was not sought to be reviewed, had power or jurisdiction to render *any* decision affecting in any way Judge Lacombe's

order, denying plaintiff's motion to remand, on which petitioner's judgment rests, is a serious question. This question, however, need not be considered here, for the reason that if such decision is in any way effective, it is certainly effective only as to the parties to said appeal and to the decree of February 23rd, 1909, appealed from, which decree dismissed the suit on the merits as to all the defendants except petitioner.

POINT III.

The rights of a party under a final judgment are in the nature of property rights. The time to appeal from petitioner's decree or judgment and the term at which it could have been modified by the Circuit Court having expired, for the Circuit Court now to vacate said judgment is to deprive petitioner of its property without due process of law, a result which it is the province of this Court to prevent.

POINT IV.

Inasmuch as it is plain as a matter of law from the record itself that the Circuit Court was without jurisdiction to enter the order vacating petitioner's decree and that said order of the Circuit Court was not made in

the exercise of judicial discretion, the writ of mandamus will issue, as petitioner has no other *adequate* remedy in the extraordinary case disclosed by the record.

It is well established by this Court that where on face of the record it *is clear as a matter of law* that the Circuit Court is assuming to act *wholly without jurisdiction,* a writ of mandamus lies.

In the case of *In re Winn,* 213 U. S., 458, Mr. Justice Moody, speaking for this Court, said (p. 468):

> "It is only in *cases where the record makes it clear as a matter of law that the Circuit Court is without jurisdiction* to take any action whatever *that the writ of mandamus lies.* This distinction has been acted on many times by this court and it is enough to refer to two very recent cases. Thus, where the removability of a case turned upon the question whether there was a separable controversy to the trial of which certain of the defendants were not indispensable or necessary parties, it was held that the Circuit Court had jurisdiction to determine the question of separability. . . .
>
> *As we have shown, the want of jurisdiction of the Circuit Court appears clearly on the record* in the case at bar, and does not, as in *In Re Pollitz* and *Ex Parte Nebraska,* depend upon findings of fact which the Circuit Court had jurisdiction to make. We think, *therefore, it is clear that the writ of mandamus ought to issue.*"

In each of the cases referred to by Mr. Justice Moody, the distinction was made between it and a case where on the face of the record absolutely no jurisdiction has attached and the right to a writ of mandamus in the latter case was affirmed.

See, also:

Ex parte Bradley, 7 Wall., 364;
Virginia v. *Rives,* 100 U. S., 313;
Virginia v. *Paul,* 148 U. S., 107;
Kentucky v. *Powers,* 201 U. S., 1;
Ex parte Wisner, 203 U. S., 449;
Re Metropolitan Ry. Receivership, 208 U. S., 90;
Matter of Dunn, 212 U. S., 374.

The motion to vacate the decree of January 10th, 1908, dismissing the bill of complaint and the cause as to petitioner was admittedly made as a preliminary step to the subjection of the petitioner to further unnecessary and fruitless litigation in the State Court concerning rights which already have been finally determined by said judgment of the Circuit Court.

This is in principle just the sort of result the mandamus in the *Winn* case (*supra*) was granted to prevent.

In that case, on the face of the record there was plainly no jurisdiction in the Circuit Court, nevertheless the Circuit Court had refused to remand the case. The plaintiff was therefore about to be subjected to the delay and expense of having to continue the litigation in the Circuit Court, which in the end must come to naught because of the lack of jurisdiction in that Court. To prevent this violation of plaintiff's rights, this Court granted a writ of mandamus to compel the Circuit Court to remand the case, saying (p. 466):

> "In such a situation the *remedy by mandamus is available, although the aggrieved party also be entitled to a writ of error or an appeal.* Mandamus, it is true, never lies where the party praying for it has another *adequate* remedy. The writ of mandamus was introduced to supplement the existing jurisdiction of the courts and to afford

relief in extraordinary cases where the law presents *no adequate* remedy. . . . But where, without any right, a court of the United States has wrested from a State court the control of a suit pending in it, *an appeal or writ of error, at the end of long proceedings, which must go for naught, is not an adequate remedy.*"

LAST POINT.

In conclusion, it is respectfully submitted, that as on the face of the record and as a matter of law the Circuit Court is plainly assuming to act wholly without jurisdiction and as petitioner has no *adequate* remedy except by a writ of mandamus from this Court, the rule should be made absolute and the writ of mandamus granted.

TOMPKINS MCILVAINE,
Of Counsel for Petitioner.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1909.

IN THE MATTER

OF

The Application of METROPOLITAN TRUST COMPANY of the City of New York for a Writ of Prohibition, or, in the alternative, for a Writ of Mandamus directed to the Honorable HENRY G. WARD, Circuit Judge of the United States for the Second Circuit and for the Southern District of New York, and directed to the CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Supplemental Brief To Be Filed with Permission of the Court on the Oral Argument Ordered on the Application under Rule Granted April 25, 1910.

In addition to the argument and citations made in the brief filed in support of this application under the rule granted by the Court April 25th,

1910, counsel begs leave to submit the following supplemental brief.

It is respectfully submitted that the error of the learned Judge below was in assuming that the decree he vacated was *void*, and that the decision of the Circuit Court of Appeals so established, said Judge saying in his opinion it would be "an absurdity" to allow a *nullity* to stand and regulate the rights of the parties. The decree vacated was *not* void or a nullity, but as valid and binding as *any* judgment ever was or could be, and the Circuit Court of Appeals *did not decide and had no jurisdiction to decide anything* to the contrary, since at plaintiff's own election the petitioner and its said decree were not before said Court of Appeals. It is, therefore, no more absurd that said decree should stand and regulate the rights of the parties than that any other unreversed and unappealed-from judgment should stand and regulate the rights of a party who has had his opportunity to appeal and elected not to do so.

If this be no longer so, then the courts have lost their function, since their judgments will never really settle anything if a judgment may be vacated at *any* time and for *any* reason.

The remainder of this supplemental brief will be devoted to what are conceived to be the underlying errors and unjustified assumptions in the brief filed by the learned counsel on the other side.

On page 4 of Mr. Hodge's brief appears the following paragraph:

> "This order" (that is the order of Judge Lacombe denying the motion to remand the case) "was made, notwithstanding that (as is held in *Campbell* vs. *Millikin*, 119 Fed., 981) a stockholder, suing on behalf of a corporation, has no controversy with the corporation—much less a separable one."

The cause of action asserted by Pollitz, the plaintiff in the suit, in which was rendered the decree vacated by Judge Ward's order, was certainly not a cause of action *on behalf* of the corporation The Wabash Railroad Company. The fundamental purpose of that action was to declare invalid certain acts of that corporation itself alleged to have been performed by the corporation in excess of its powers which acts, it was alleged, were resulting in the issue of illegal and void bonds and shares of stock.

This cause of action was not a derivative cause of action asserted by Pollitz, in behalf of the Railroad Company, because that company would not bring the action itself, but a cause of action asserted directly by Pollitz himself in his own behalf as a stockholder in the company, to prevent the alleged impairment of the value of his stock by the issue of further stock and bonds. This cause of action was wholly between the plaintiff Pollitz on the one hand, and against the Railroad Company on the other, and if any such cause of action in favor of Pollitz existed at all, it existed in his favor directly *against* the Railroad Company, and arose out of the acts performed by the Company in alleged violation of Pollitz's contract of membership in that company. Obviously such a cause of action could not have been asserted by the Railroad Company against itself.

This was the first and primary and fundamental cause of action asserted by the bill, and there was also asserted a second, or what might be called an alternative, cause of action, in which it was sought, if the Court refused to declare the new securities void, that various individual defendants, some of whom were officers and directors of the road and others who were not, should be held in damages *to be paid to Railroad Company.* This second cause of action consequently was derivative from, and for

the benefit of the Railroad Company. The first cause of action was predicated upon the theory that the new bonds and stock were void, and the second cause of action upon the contradictory theory that they were not void, but issued without sufficient consideration *to* the Railroad. In the first cause of action Pollitz was the real as well as the nominal plaintiff, while in the second cause of action the Railroad Company was the true plaintiff. In passing, it may be noticed that one of the grounds of petitioner's demurrer was that the bill was multifarious, as stating two fundamentally distinct causes of action in which the real plaintiffs were not even the same.

It is not assumed that the Court will on this application go into the question of whether or no Judge Lacombe was right or wrong in refusing to remand the case. This Court refused to do so when Pollitz sought a mandamus to compel Judge Lacombe to remand (*In re* Pollitz, 206 U. S., 323). It is sufficient for the purposes of this application to point out, as this Court did *in re* Pollitz *supra,* that the suit, having been removed on the ground that a separable controversy existed, it was the province and duty of the Circuit Court, and of the Circuit Court alone, to determine whether such a separable controversy did exist. Judge Lacombe having determined that a separable controversy did exist, and in pursuance of that determination the decree dismissing the suit as to the Trust Company having been entered, and that determination and said decree never having, *as to the Trust Company,* been reviewed by any appeal *binding on said Trust Company,* the question of whether or no a separable controversy did exist has been finally settled, at least so far as the Trust Company is concerned. *Consequently the decree of January 10, 1908, was not "void" or a nullity and cannot be collaterally attacked.*

At the top of page 5 of said brief it is said:

> "Since no appeal could be taken from the order denying the motion to remand, the complainant in March, 1907, applied to this Court for a writ of mandamus, and such proceedings were had as resulted in a denial of the writ and the delivery of an opinion which is reported *in re* POLLITZ, 206 U. S., 323."

While it is true that no appeal could have been taken *directly* from Judge Lacombe's order denying the motion to remand, the plaintiff could have reviewed *as to petitioner* the order refusing to remand by an appeal from the decree of January 10, 1908, dismissing the Trust Company from the suit. The question whether such appeal could have been taken immediately upon the rendering of said decree or only after the decree dismissing the suit on the merits as to all the other defendants, which was rendered on February 23, 1909, is immaterial. In any event the complainant had the opportunity to review as to the Metropolitan Trust Company the correctness of the order denying the motion to remand. He has elected not to review such order as to the Metropolitan Trust Company, and consequently cannot here complain of that decision or claim it was incorrect.

On page 5 of said brief it is said:

> "An order was thereupon rendered January 10, 1908, sustaining the demurrer of the petitioner and allowing the other defendants to answer. This is the order which is constantly referred to in the petitioner's papers and on the brief of its counsel as a 'final order.'
>
> "No appeal could be taken from this order, if we are right in our contention that it was not a final decision."

It is wholly immaterial whether the decree of January 10, 1908, was final and appealable when entered since in any event it became final and appealable when the decree dismissing the suit as to all the remaining defendants was entered on February 23, 1909, and plaintiff then at least had the opportunity to appeal. He elected not to do so and did not make the motion to vacate said decree until ~~May 15~~ March 31, 1910, more than two years after the entry of the decree he desired to vacate and more than one year after the entry of the decree dismissing the suit as to all the remaining defendants.

On page 6 of said brief it is stated:

> "The cause is now pending in the state court."

The cause is *not* "now pending" in the State Court at least *as to the Metropolitan Trust Company*. It is to prevent such a result that this application is made. Furthermore, the order entered on the mandate of the Circuit Court of Appeals expressly excluded the Metropolitan Trust Company from the operation of the order remanding the case to the State Court.

On the top of page 7 of said brief, it is said:

> "Judge Ray should have remanded the whole cause in accordance with the mandate of the Circuit Court of Appeals, and hence application should be made now to him to do what he should have done then."

Judge Ray did not and should not, under said mandate, have remanded to the State Court the whole cause, that is, the cause including the Metropolitan Trust Company as well as the other defendants. The Metropolitan Trust Company and its decree of January 10th, 1908, were in no way before the Circuit Court of Appeals or subject to

its jurisdiction, and the Circuit Court of Appeals did not order, *and had no jurisdiction to order*, that the cause *as to the Metropolitan Trust Company* should be remanded to the State Court.

On the top of page 8 of said brief it is said:

> "It would seem that the important proposition . . . is whether the Circuit Court retained sufficient jurisdiction over the cause of Pollitz *vs.* The Wabash Railroad Company and others, . . . to set aside an order entered at a preceding term which sustained a demurrer as to one of the defendants, the motion being made at the same term wherein an order had been entered, in accordance with the mandate of the Circuit Court of Appeals, remanding the cause to the state court (as to all the necessary defendants) on the ground, that such diverse citizenship did not exist as to give the federal courts jurisdiction to take any proceedings, or to render any decrees in this cause."

The question here is not whether the Circuit Court had any power to enter any order during the term at which was rendered *the decision of the Circuit Court of Appeals*, because the Metropolitan Trust Company was not before the Circuit Court *of Appeals* when it made its decision, but whether the Circuit Court had any jurisdiction to vacate the decree of January 10th, 1908, after the expiration of the term at which that decree was rendered, *as well as after the expiration of the term at which was rendered the decree dismissing the suit as to all the other defendants.*

On page 9 of said brief it is said:

> "But if it" (that is the decree of January 10th, 1908, dismissing the suit as to the Metropolitan Trust Company) "was not a final decree, and if no appeal could be taken from it, then necessarily the entire argument of the petitioner falls to the ground."

This reasoning is not comprehended by counsel for the petitioner. The petitioner's position is that the decree of January 10th, 1908, either was a final decree when rendered, or at least, became final when the decree dismissing the suit as to all the remaining defendants was entered. In either event the plaintiff had his opportunity to review petitioner's decree on appeal and elected not to do so.

At page 9 of said brief it is further said:

> "Whereas, if the decree" (that is of January 10th, 1908) "was a final one, from which an appeal could be taken, then it is incumbent upon us to show, as we believe we can, that the motion below was an exception to the rule that a motion to set aside a judgment must be made at the term during which the judgment was entered. In other words, that it was in effect a motion in the nature of the ancient writ of *coram vobis*, or, as it was called in English, *coram nobis*."

The writ of *coram vobis* was a writ used to correct certain errors in *actions at law*, which corrections can now be made by motion. It is well settled that in no case was said writ ever issued to correct "an error in the judgment itself." (See cases cited in main brief, Point I.)

The rule is recognized by all the cases, even by the very case particularly relied upon by Mr. Hodge himself, and cited at a number of places in his brief, to wit, the case of SHUFORD *v.* CAIN, 1 Abbott's U. S. Reports, 302, where, at page 306 thereof, it is said:

> "A rule is that the same court which pronounced and entered up final judgment cannot at a subsequent term vacate it *for errors* in law; this is the doctrine of the common law and also of the Supreme Court of the United States. Some of the exceptions to the rule are where the judgment was irregu-

> lar or where no notice had been served upon the defendant or for fraud or misprison of the clerk."

In the Shuford case judgment had been entered *by default* by an assignee of a promissory note, of which the maker and payee were citizens of the same State, and it was held that as the payee could not have sued the maker, his assignee, who was a citizen of a different State, was in no better position under Section 11 of the Judiciary Act of September 24th, 1789, then in force.

The case is not an authority against the position of the petitioner, and if it were, it would be of but slight assistance to Mr. Pollitz, since it would be in direct conflict with many decisions of this Court. In the case of BRONSON *v.* SCHULTEN, 104 U. S., 410, this Court said, page 416:

> "It is quite clear upon the examination of many cases of the exercise of this writ of error *coram vobis* found in the reported cases in this country, and as defined in the case of this court above mentioned, and in England, that it does not reach to the facts submitted to a jury, or found by a referee, *or by the court sitting to try the issues.*"

See also cases cited on petitioner's main brief under Point I.

Of course the question of whether the suit was properly removed to the Circuit Court was the fundamental question at issue before there could be entered the decree dismissing, with costs, the suit as to the Metropolitan Trust Company. That question had been determined adversely to Pollitz and in favor of the removability of the suit. Even, therefore, were the action one at law, in which the writ of *coram vobis* could formerly have been allowed, and whose office could now be performed by motion, the decree of January 10th, 1908, was

not properly vacated since the alleged error was "in the judgment itself."

In equity, after term time, there is in certain cases a remedy by bill of review. But even in equity a bill of review would not lie to correct the alleged error here complained of, and, in any event, a bill of review must, with certain exceptions, which would have no application here, be brought before the time to appeal expires.

TRUST CO. *v.* GRANT LOCOMOTIVE WORKS, 135 U. S., 207.

MR. HODGE assumes that petitioner admits that the Circuit Court of course had power in some way or other to vacate the decree of January 10th, 1908, and that the petitioner is merely objecting to the form of the remedy. See Mr. Hodge's brief, at bottom of page 22, where it is erroneously said: "It is urged by petitioner that our only remedy is to bring a bill in equity. This is circuitous, unnecessary, expensive." Petitioner has never urged anything of the sort. Mr. Hodge entirely misapprehends petitioner's attitude.

The petitioner's position is: The Circuit Court, in the exercise of its proper jurisdiction, determined that a separable controversy existed; that determination has never been reversed as to the Metropolitan Trust Company; the Circuit Court also determined that the Metropolitan Trust Company was entitled to be finally dismissed from the suit, with costs, and the decree of January 10th, 1908, finally dismissing the Metropolitan Trust Company from the suit, with costs, was entered in pursuance of such determinations; the plaintiff had the opportunity to appeal from that decree and to review *as to petitioner* the correctness of the determination that a separable controversy existed by assigning as error on such appeal the refusal to

remand and plaintiff elected not to do so; that consequently the Metropolitan Trust Company's rights under its said decree are *res adjudicata* and constitute property rights, of which it could not after term time be deprived except by appeal.

It follows that the decree of January 10, 1908, cannot now be vacated by writ of *coram vobis*, motion or bill of review, because the fancied error goes to the very issue that the Circuit Court had jurisdiction to determine and did determine in favor of petitioner.

At page 9 of said brief it is further said:

> "The second cardinal error which permeates the entire brief of the petitioning defendant is that it was a necessary party to the action."

This is not the petitioner's claim. On the contrary, the ground of removal was that petitioner was not a necessary party and that the controversy was really between the plaintiff and the Wabash Railroad Company, and consequently that the action was removable. Furthermore, the Metropolitan Trust Company demurred to the complaint on various grounds, among others on the ground that the bill was as to the Metropolitan Trust Company wholly without equity, which demurrer was sustained.

Mr. Hodge says the plaintiff has never contended that the Metropolitan Trust Company was a necessary party. Then why was said Trust Company originally made a party to the bill and why does the plaintiff now seek to bring the Trust Company back into court and to have the case as to it remanded to the state court and said Trust Company subjected to further wholly useless and unnecessary litigation and expense?

Just what is intended by this argument made by counsel, it is difficult to comprehend unless it be to

suggest without actually asserting that because the Metropolitan Trust Company was not a necessary party to the original bill, it was not a necessary party to the appeal to the Circuit Court of Appeals. Whether the appeal to the Circuit Court of Appeals was of *any* force or effect because the Metropolitan Trust Company was omitted therefrom, it is not necessary to here argue. But certainly it cannot be successfully contended that the decision of the Circuit Court of Appeals on the appeal to which the Trust Company was not a party, could in any way affect its rights under its judgment which was not appealed from. Therefore, whether or no the Circuit Court of Appeals had on the so-called appeal jurisdiction to review *as to the other defendants* the question of whether or no the suit was properly removed, the said Circuit Court of Appeals certainly had no jurisdiction to review the question of removability *as to the Metropolitan Trust Company.* Consequently, if on this application it is sought to attribute any force or effect to the decision of the Circuit Court of Appeals, the conclusive answer to any such argument is that the Metropolitan Trust Company *was a necessary party to such appeal,* even if the Trust Company was not a necessary party to the cause of action stated in the bill of complaint.

On page 10 of said brief it is said:

> "The third cardinal error which we find upon the petitioner's brief, is the false assumption that it is impossible to bring a party into court subsequent to a term, wherein a void or invalid judgment is entered, by a notice of motion."

The petitioner does not assume anything of the sort. No such question arises in this application. There is no question here of vacating a *void* or invalid judgment. The decree of January 10th, 1908,

was not void or invalid. The Circuit Court, and the Circuit Court alone, had jurisdiction to determine the question of whether a separable controversy existed. Having determined that question in favor of removability, the decree of January 10th, 1908, entered in pursuance of such determination was final and conclusive, unless reviewed on appeal. *There is no authority for asserting that the decree was void.* This Court has held to the contrary time and time again. The leading cases are referred to in Point II of petitioner's main brief, and none of the cases cited by the learned Circuit Judge below in his opinion on vacating said decree or by Mr. Hodge in his brief is authority to the contrary.

On page 12 of said brief it is said in the head note of Point II:

> "The writ of mandamus cannot be used to compel the Circuit Court, to take jurisdiction of a cause, which it has decided, through its Court of Appeals, it has no jurisdiction to consider, owing to a failure to show diverse citizenship, between the necessary parties."

A writ of mandamus is not asked to compel the Circuit Court *to take* jurisdiction, but on the contrary it is asked to compel the Circuit Court *to cease* taking jurisdiction and to vacate an order which it has made in the exercise of a jurisdiction which it should never have assumed. Furthermore, it has *not* been decided through the Circuit Court of Appeals, at least *as to the Metropolian Trust Company*, that the Circuit Court had no jurisdiction to consider the cause.

On page 12 of said brief it is further said:

> "A court has the right *ex mero motu* to refuse to consider a cause over which it has no jurisdiction, and similarly to vacate what

> it may have done in a cause over which it has no jurisdiction."

As already pointed out, there is no such question in this case.

On page 12 of said brief it is further said:

> "*Its* decision that there is not that diverse citizenship which gives it jurisdiction is final and will not be reviewed by this Court."

"Its" being evidently intended to refer to the Circuit Court. The Circuit Court has made no such determination and this Court is not asked to review any such determination.

It is further said on page 12 of said brief:

> "The conclusion of the Circuit Court that the cause should be remanded is not reviewable here by appeal or writ of error or by mandamus."

The petitioner is not seeking to review here any conclusion of the Circuit Court that the cause should be remanded and the Circuit Court has not determined as to the petitioner that the case should be remanded.

On pages 12 and 13 of said brief it is said:

> "A motion in the nature of a writ of error *coram vobis* 'is the exercise of jurisdiction in the court below which does not admit of revision in this tribunal.' . . . The petitioner is also endeavoring to make the writ of mandamus perform the office of a writ of error. This Court has emphatically held that this cannot be done 'even if no appeal or writ of error is given by law.'"

The present application for a mandamus does not seek to revise a writ of error *coram vobis.* The *mandamus is asked to restrain the Circuit Court within its jurisdiction in a case where the petitioner would otherwise be subjected, at great expense, to*

further litigation which would come to naught, and for which it would have no adequate remedy and in a case where the lack of jurisdiction of the Circuit Court to make the order complained of plainly appears on the face of the record as a matter of law.

The decisions of this court *uniformly* sustain the right to mandamus under these circumstances. The cases are referred to in Point IV of petitioner's main brief. See also the recent case of *In re* Cleland, 218 U. S., 120, Opinion, Mr. Justice Holmes. None of the cases cited by Mr. Hodge are authorities to the contrary.

As already pointed out, the argument made in Point III of Mr. Hodge's brief has no bearing on the questions here at issue; the decree of January 10th, 1908, was either final and appealable when entered or became such when the decree of February 23rd, 1909, dismissing the suit as to all the remaining defendants was entered; and the terms at which both decrees were entered expired long before the motion to vacate the decree of January 10th, 1908, was made.

On page 15 of said brief a quotation is given apparently as being an extract from the brief of the petitioner's counsel. It is immaterial, but the extract is not from any brief of counsel for the petitioner.

As the remaining arguments in Mr. Hodge's brief which petitioner would wish to answer are mainly repetitions of matters that have already been criticized, it is sufficient only to mention the following:

On page 17 it is said in the head note of Point VI., that

> "no error was committed . . . in granting complainant's motion to vacate that order, or decree" (decree of January 10th,

> 1908) "on the suggestion, or motion of complainant, in view of the mandate of the Circuit Court of Appeals, *establishing the fact, that the diverse citizenship did not exist,* which was necessary to give jurisdiction to the Court to enter the decree."

Of course, the mandate of the Circuit Court of Appeals did not and could not establish the fact *as to the Metropolitan Trust Company* that diverse citizenship did not exist, since the Metropolitan Trust Company was not a party to the appeal on which that mandate was issued and the order entered on said mandate expressly excepted the petitioner from the operation of the direction remanding the cause.

At the bottom of page 17 of said brief, it is said, that Judge Ward recognized the rule that a judgment cannot be vacated after the expiration of the term; and it is further said, "But the exceptions to this rule are many. They include a judgment or order which is not final."

Of course, a judgment which is not final can be vacated until the expiration of the term at which *final judgment* is entered, because until the expiration of the term at which final judgment or decree is entered the parties are in court. The point here, however, as already said, is that the decree of January 10th, 1908, was either final when entered or became such on February 23rd, 1909, when the decree dismissing the suit as to all the other defendants was entered and the motion to vacate the decree of January 10th, 1908, was not made until long after the expiration of the terms at which both of said decrees were entered.

On page 18 of said brief there are further arguments concerning void judgments, which arguments for the reasons already stated have no application here.

Toward the bottom of page 19 of said brief, further erroneous reference is made to the effect of the decision of the Circuit Court of Appeals, counsel saying:

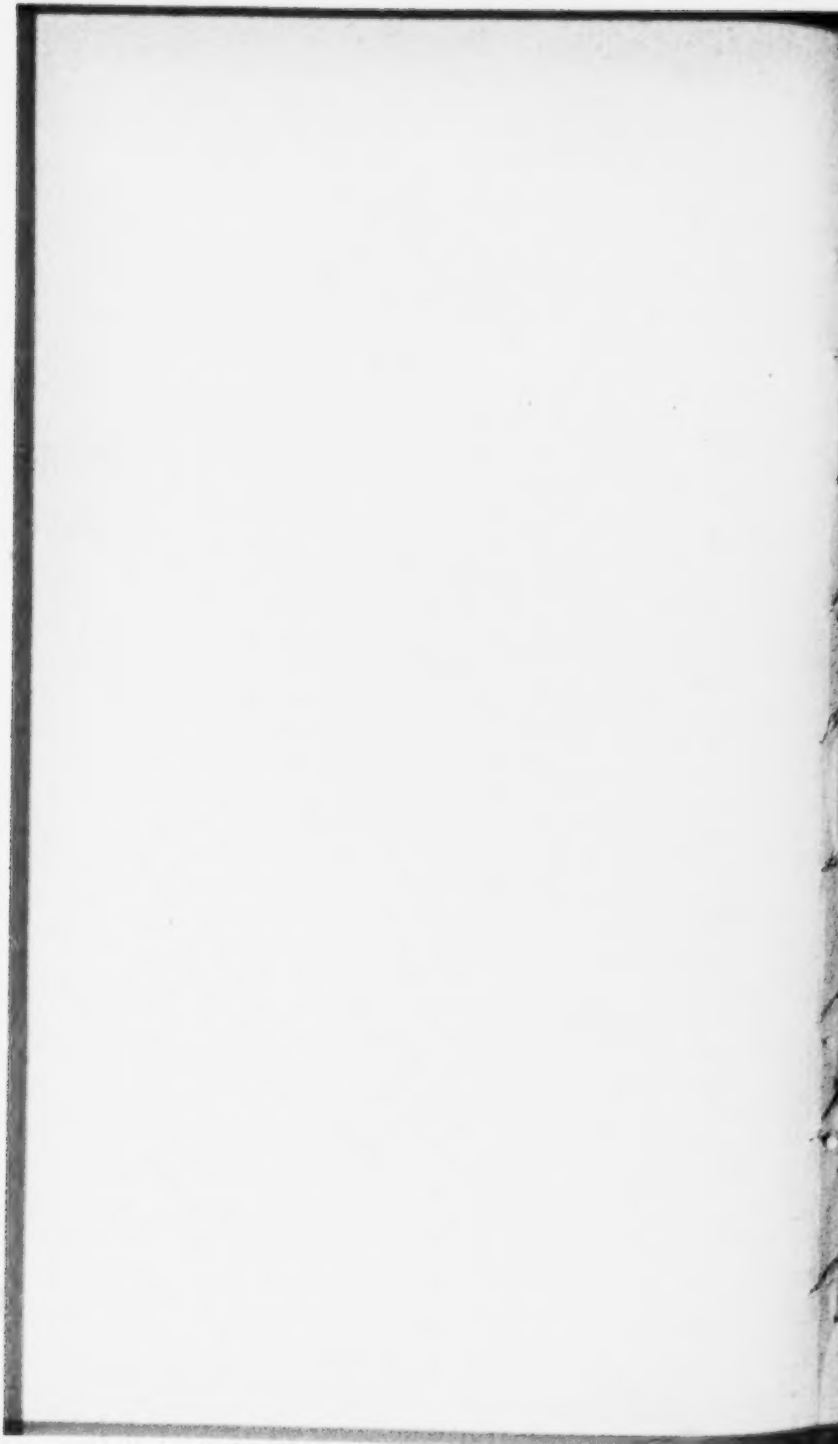
> "In the case at bar the lack of jurisdiction of the cause has been passed upon and finally decided by the Circuit Court of Appeals."

Of course, the Circuit Court of Appeals has not and could not have decided or passed upon anything *as to the petitioner.*

At the bottom of page 19 and top of page 20, the case of *in re Hohorst*, 150 U. S., 653, is referred to. The point of the Hohorst case was that the cause of action against the defendants was *joint.* One of the defendants was dismissed and the action continued against the other, and final judgment against the latter had never been entered; under these circumstances both defendants were still subject to the jurisdiction of the court, and the appeal that was taken from the decree dismissing the one defendant was premature. The fact that the defendant who had been dismissed appeared specially to dispute the jurisdiction of the Court over him availed him nothing, since it was perfectly clear he was still in court and subject to the jurisdiction of the Court, final judgment on a *joint* liability not having been entered.

It is respectfully submitted that the rule granted by this Court April 25, 1910, should be made absolute.

TOMPKINS MCILVAINE,
Of counsel for Petitioner.



No. 12 Orig.

Supreme Court of the United States

October Term—1909

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JAMES H. McK

IN THE MATTER

of

The Application of THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK for a Writ of Prohibition or Mandamus against the HONORABLE HENRY G. WARD, Circuit Judge of the United States for the Second Circuit, and against THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Return of Henry G. Ward, Circuit Judge of the United States for the Second Circuit and of the Circuit Court of the United States for the Southern District of New York.

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Supreme Court of the United States

In the Matter

of

The Application of The Metropolitan Trust Company of the City of New York for a writ of Prohibition or Mandamus against the Honorable Henry G. Ward, Circuit Judge of the United States for the Second Circuit, and against The Circuit Court of the United States for the Southern District of New York.

Return of Henry G. Ward, Circuit Judge of the United States for the Second Circuit and of the Circuit Court of the United States for the Southern District of New York.

To the Honorable Melville W. Fuller, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

In compliance with the order to show cause issued by your Honorable Court on the 25th day of April and served on the 28th day of April, 1910, the above named respondents do respectfully represent that:

The reasons for the action of the Court in vacating the judgment which dismissed the bill of complaint in the original cause as against the defendant The Metropolitan Trust Company of the City of New York, are fully set forth in the opinion of the undersigned taken in connection with the opinion of the Circuit Court of Appeals and the other proceedings annexed to the order to show cause, all of which are returned herewith.

J. Aspinwall Hodge, of counsel for the complainant in the original cause having desired to be heard is designated to present this return and file such brief and make such argument as may be permitted on the order to show cause.

April 28, 1910.

HENRY G. WARD,
United States Circuit Judge.

No. 12 Orig.

[redacted]

Supreme Court of the United States

October Term—1909

IN THE MATTER

of

The Application of THE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK for a Writ of Prohibition or Mandamus against the HONORABLE HENRY G. WARD, Circuit Judge of the United States for the Second Circuit, and against THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief of Mr. Hodge in Opposition to Application for a Writ of Prohibition or Mandamus

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In The
Supreme Court of the United States

OCTOBER TERM, 1909.

IN THE MATTER

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The Application of the METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK for a Writ of Prohibition or Mandamus against the HONORABLE HENRY G. WARD, Circuit Judge of the United States for the Second Circuit, and against THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief of Mr. Hodge in opposition to the application for the issue of a writ of prohibition, or mandamus, prohibiting the Circuit Court from exercising jurisdiction over the Metropolitan Trust Company in a pending cause, or over a certain decree entered January 10, 1910, or, in the alternative, commanding the Circuit Court to annul an order entered April 25, 1910, vacating the said decree.

This is a hearing upon the return of a rule directing Judge WARD of the Second Circuit to

show cause, why a writ of prohibition, or mandamus, should not issue, prohibiting him from assuming or exercising any jurisdiction over the petitioner, the Metropolitan Trust Company, a defendant in a certain pending cause entitled *James Pollitz vs. The Wabash Railroad and others,* or over a decree in that cause, dated January 10, 1908, or, in the alternative, commanding the said judge "to annul, and set aside, any order that may be entered" vacating said decree. See rule entered April 25, 1910, fol. 235, also fols. 26 and 27.

For the convenience of the court we print an index of the exhibits which are a part of the record, giving them in chronological order.

Statement of the Case.

The action of *Pollitz vs. Wabash Railroad* and others, including the Metropolitan Trust Company of the City of New York, the petitioning defendant, was begun January 15, 1907, in the Supreme Court of New York, by the complainant, a stockholder of the defendant railroad company (fol. 5), on behalf of the company, and his fellow stockholders.

The bill sought to set aside and enjoin the performance of an unlawful agreement prejudicial to the stockholders (fol. 96 et seq.).

The complainant, and nearly all the defendants, including the petitioning defendant, are citizens of New York (fols. 39 and 40).

The defendant Wabash Railroad Company is a consolidated corporation created under the laws of Missouri, Ohio, Indiana, Michigan and Illinois (fol. 37).

The defendants may be divided into two classes:

FIRST, the defendant railway company, the leading defendant (at least in the sense of being first named), and a number of individuals and corporate defendants, including the directors of the railway company, all of whom are charged with confederating and acting with the defendant corporation to carry out the illegal agreement, *ultra vires* of the company, for their own benefit, and to the prejudice of the company, the complainant, and all the other stockholders (fols. 63 et seq., 96 and 201). As against them the bill prays, that certain illegal securities issued at their instigation, and to some of them, be returned to the treasury of the company, or that they make good to the company, the value of such securities, whoever may be the present holders.

The SECOND class of defendants consists of such as had no part in the conspiracy. It consists of but one defendant, to-wit, the Metropolitan Trust Company, the petitioner here. It is charged only with being the purchaser of certain of the new and illegal bonds, and it is expressly alleged that it does not belong to the first class of defendants (fol. 96).

Against it, affirmative relief is prayed for, to-wit, that it be ordered to return to the defendant Wabash Railroad Company all of the bonds received by it, or, in default of such return, pay into the treasury of the company on whose behalf the complainant sues, the amount that is due in the premises (fols. 102, 103 and 191).

The case was removed, by the Wabash Railroad Company, to the United States Circuit Court, in January, 1907, on the ground that a separable controversy existed between the complainant, a citizen of New York, and the defendant railroad company, a citizen of several other states, but not of New York (fol. 8).

In February, 1907, Judge Lacombe granted an order, denying a motion to remand the cause to the state court (fols. 9 and 130 *et seq.*).

This order was made, notwithstanding that (as is held in *Campbell vs. Milliken*, 119 Fed., 981) a stockholder, suing on behalf of a corporation, has no controversy with the corporation—much less a separable one.

The cause was, at the same time, consolidated with another, and earlier, cause between the same complainant, and certain of the same defendants (fol. 15), but not including the Metropolitan Trust Company (fols. 15 and 16), and an order entered denying a motion of the complainant to dismiss the first cause (fols. 171, 174).

Since no appeal could be taken from the order denying the motion to remand, the complainant, in March, 1907, applied to this court for a writ of mandamus, and such proceedings were had as resulted in a denial of the writ and the delivery of an opinion which is reported *in re Pollitz*, 206 U. S., 323.

Thereafter all the defendants, who had been served, demurred, and all the dumerrers were overruled except that of the petitioning Trust Company (fol. 14).

The ground of sustaining the demurrer is not clear, and we do not believe is material.

An order was thereupon rendered January 10, 1908, sustaining the demurrer of the petitioner and allowing the other defendants to answer. (See decree, fols. 145 *et seq.*) This is the order which is constantly referred to in the petitioner's papers and on the brief of its counsel as a "final decree."

No appeal could be taken from this order, if we are right in our contention that it was not a final decision (Point III, *infra*); but whether interlocutory or final, no appeal was taken.

Answers were then filed by the other defendants under the leave granted by the decree, and after proofs were taken, and a hearing had before Judge RAY, a final judgment was entered February 23rd, 1909, dismissing the bill and granting certain affirmative relief asked for by the defendant railroad corporation in its cross bill (fols. 15, 16 and 154 *et seq.*)

An appeal was taken to the Circuit Court of Appeals, resulting in an opinion rendered the 18th day of February, 1910 (fols. 18, 19, 20 and 193 *et seq.*). This was followed by the mandate of the Circuit Court of Appeal directing the Cir-

cuit Court to reverse the final decree of February 23, 1909, and remand the cause to the state court (see fol. 170 *et seq.*).

An order was thereupon entered upon the 28th day of February, 1910, by Judge RAY remanding the cause, but containing a provision that the order should not apply to the petitioning defendant, the Metropolitan Trust Company. See order fols. 166 *et seq.* and fol. 177.

The cause is now pending in the state court.

On the 21st of March, 1910, the defendant Metropolitan Trust Company, and its solicitors, were served with a notice of motion upon the affidavit of the complainant's solicitor, praying for an order vacating the judgment of January 10, 1908, and for an order remanding the cause to the state court as to the petitioning defendant (fols. 20, 178 *et seq.* and 183).

This motion was argued before the respondent, Judge WARD who granted the motion to vacate the decree; but suggested in his opinion and in the order that the motion to remand should be "denied without prejudice, upon the ground that an application for such relief should more properly be made to the judge of this court who entered the order herein to remand this cause as to all the other defendants" (fols. 223 and 233).

Judge WARD'S opinion and order are found at fols. 217 *et seq.* and 226 *et seq.*

In his return he refers to his opinion, as giving the reasons for his action. It contains the reasons for his granting the motion to vacate, but does not give his reasons for denying the motion to remand.

Without being authorized to state what his reasons were, three very good ones suggest themselves.

FIRST, Judge RAY should have remanded the whole cause in accordance with the mandate of the Circuit Court of Appeals, and hence application should be made now to him, to do what he should have done then;

SECOND, although the Metropolitan Trust Company was not before Judge RAY, yet it might be suggested, notwithstanding the wording of his order, that he had passed upon the question of remanding the cause as to the petitioning defendant, instead of merely refusing to pass upon it, and hence any action by another judge might possibly construed as overruling Judge RAY;

THIRD, any order which Judge RAY may now enter remanding the cause will rest both upon the vacation of the decree of January 10, 1908, and upon the mandate of the Circuit Court of Appeals, remanding the cause; whereas any order remanding the cause, made by Judge WARD, could not, as conclusively, be said to have been made, in accordance with that mandate (which was not addressed to him) but rather because of the vacation of the order of January 10, 1908.

Upon these facts the petitioning defendant has applied to this court, I contend erroneously, for a writ of prohibition or mandamus, to compel the vacation of the order of Judge WARD vacating the order of January 10, 1908, which sustained the demurrer of the petitioning defendant.

Judge WARD, in his return, refers to the proceedings recited in the exhibits annexed to the order to show cause, and especially to his opinion (fols. 217 *et seq.*), and to the opinion (written by him) in the Circuit Court of Appeals (fols. 194 *et seq.*) as giving his reasons for granting the motion.

It would seem that the important proposition of law which is before this court for determination is whether the Circuit Court retained sufficient jurisdiction over the cause of *Pollitz vs. The Wabash Railroad Company and others*, to entertain a motion, to set aside an order, entered at a preceding term, which sustained a demurrer as to one of the defendants, the motion being made at the same term wherein an order had been entered, in accordance with the mandate of the Circuit Court of Appeals, remanding the cause to the state court (as to all the necessary defendants) on the ground, that such diverse citizenship did not exist as to give the federal courts jurisdiction to take any proceedings, or to render any decrees in this cause.

If this question is answered in the negative, then it still remains to consider whether the petitioner has chosen its proper remedy in making its present application for a writ of prohibition or mandamus.

Errors in Petitioner's Brief.

It has been my privilege to read the brief submitted by the petitioner, upon its application for the order to show cause, and I have been informed by the petitioning defendant's counsel, that it contains the substance of his main brief on the return of the order to show cause. I believe that by pointing out two or three cardinal errors in Mr. McIlvaine's presentation of the matter, the issue will be clarified.

At the top of page 3 in the petition (fol. 14) and in the prayer at the foot of the petition (fol. 26) as well as in the brief, the order of January 10, 1908, is referred to as a "final decree"; and the petitioner complains that no appeal was ever

taken from this so-called final decree (petitioner's brief, p. 8).

Whether the order was a final decree or not, we believe that the motion below was properly granted.

But if it was not a final decree, and if no appeal could be taken from it, then necessarily the entire argument of the petitioner falls to the ground. Whereas, if the decree was a final one, from which an appeal could be taken, then it is incumbent on us to show, as we believe we can, that the motion below was an exception to the rule that a motion to set aside a judgment must be made at the term during which the judgment was entered. In other words, that it was in effect a motion in the nature of the ancient writ of *coram vobis*, or, as it was called in England, *coram nobis*.

The second cardinal error which permeates the entire brief of the petitioning defendant is that it was a necessary party to the action.

I have already pointed out, at the opening of this brief, that it was only a proper party. It has never been suggested by any of the counsel in this case, or by any of the judges before whom the cause has come in any form, that the Metropolitan Trust Company was a necessary party.

Judge LACOMBE held, in accordance with the contention of all the defendants and their counsel, that the Wabash Railroad Company was the only necessary defendant.

When the matter was before this Court (*in re Pollitz*, 206 U. S., 323), it was urged by Mr. Roger Foster on behalf of the complainant, that there were other necessary parties; but he contended, nowhere in his brief, that the Metropolitan Trust Company was one of these.

When the matter came before the Circuit Court of Appeals the present counsel of the complainant did not contend that the petitioner was a necessary party, and that court expressly held that the other defendants who were before it (the Metropolitan Trust Company was not one of these) were necessary parties because "the bill charged them, or some of them, with confederating to carry out an illegal agreement, *ultra vires* the company, for their own benefit," etc. (fol. 201).

The bill expressly excepted the Metropolitan Trust Company from this class of defendants (fol. 96).

The third cardinal error, which we find upon the petitioner's brief, is the false assumption that it is impossible to bring a party into court subsequent to a term, wherein a void or invalid judgment is entered, by a notice of motion; or, if we misunderstand Mr. McIlvaine's reasoning, and if he admits that there are cases when a party may be thus brought into court, to have a judgment entered in his favor vacated for want of jurisdiction, then, the error of our friends upon the other side is, in assuming that this case is not one of those cases in which a motion can perform the function of the ancient writ of error *coram vobis.*

The Nature and Character of the Complainant's Motion.

The issue is not one of nomenclature. As COWEN, J., said in *Smith vs. Kingsley,* 19 Wend., 620, 621, "we have lost the name of the writ, nothing more."

It matters little what the motion is called, and whether or not it falls exactly within the definition of the ancient writ referred to. That writ is defined to be one which can be issued at any term, sometimes years after a final decree, to vacate it,

because of the existence of some fact which shows that *the court did not have jurisdiction to render the decree*, such as that one of the defendants against which it was entered had died before judgment, or was an infant and was not represented by a guardian although represented by an attorney; or was a *femme covert* and her husband was not a party; or that there was misprision of the clerk, *or some like fact*, which existed and which robbed the court of its jurisdiction, or rather which showed that the court never had jurisdiction, and the judgment was void *ab initio*.

Before Blackstone's time this writ had been so generally superseded by a motion that it is not mentioned in his Commentaries. Both the motion and the writ were in use at a late day in New York; and this court has frequently discussed, and sustained cases, wherein the motion has been used in place of the writ.

In the case at bar we have a fact similar to those frequently relied upon, for the issuance of the ancient writ, and which, as conclusively, shows that the court had no jurisdiction.

The fact which the court then ignored (owing to the previous decision of Judge LACOMBE which was non-appealable and against which this court would not grant us relief) was, that diverse citizenship, as between the complainant and the necessary defendants, was lacking, and it was that fact alone which could give the jurisdiction to the federal court.

With this general statement of the facts, and of the nature of the plaintiff's motion below, we may proceed to a brief consideration of the authorities which we believe support the position taken by the learned judge below in addition to those recited in his opinion at folio 222.

POINT I.

This Court has no power to issue a writ of prohibition, in any case, except where the court below is proceeding as a Court of Admiralty.

None of the cases cited under Point III (a) of Mr. McIlvaine's brief negative this proposition.

The writ is now confined to Admiralty cases and never includes the prohibition of an act already completed. *Ex parte Christy,* 3 How., 292; *Ex parte Easton,* 95 U. S., 68, 72.

POINT II.

The writ of mandamus cannot be used to compel the Circuit Court, to take jurisdiction of a cause, which it has decided, through its Court of Appeals, it has no jurisdiction to consider, owing to a failure to show diverse citizenship, between the necessary parties.

This is practically what the petitioner demands.

A court has the right *ex mero motu* to refuse to consider a cause over which it has no jurisdiction, and similarly to vacate what it may have done in a cause over which it has no jurisdiction.

Its decision that there is not that diverse citizenship which gives it jurisdiction is final and will not be reviewed by this court.

The conclusion of the Circuit Court that the cause should be remanded is not reviewable here by appeal or writ of error or by mandamus, *In re Pennsylvania Co.,* 137 U. S., 451, 454; *Missouri Pac. R. R. vs. Fitzgerald,* 160 U. S., 556, 581.

A motion in the nature of a writ of errror

coram vobis "is the exercise of jurisdiction in the court below which does not admit of revision in this tribunal" *Ledgerwood vs. Pickets,* 15 Fed., Cas., 132; s. c., 1 McLean, 143; s. c., 7 Peters, 144, 148.

The petitioner is also endeavoring to make the writ of mandamus perform the office of a writ of error.

This court has emphatically held that this cannot be done "even if no appeal or writ of error is given by law" *In re Rice,* 155 U. S., 396, 403, citing *American Construction Company,* 148 U. S., 372, 379, *Ex parte Loring,* 94 U. S., 418.

The application seems also to contravene the rule sated in *Ex parte Newman,* 14 Wall., 152, where the court *held*:

> "Superior tribunals may by mandamus com-
> "mand an inferior tribunal to perform a legal
> "duty where there is no other remedy, and
> "the rule applies to judicial as well as to
> "ministerial acts; but it does not apply at all
> "to a judicial act to correct an error, as where
> "the act has been erroneously performed. If
> "the duty is unperformed and it be judicial
> "in its character, the mandate will be to the
> "judge, directing him to exercise his judicial
> "discretion or judgment, without any direct-
> "tion as to the manner in which it shall be
> "done, or if it be ministerial, the mandamus
> "will direct the specific act to be performed"
> citing *Carpenter vs. Bristol,* 21 Pick., 258; Angell & Ames on Corporations (9th Ed.), §720.

POINT III.

An order or decree sustaining the demurrer of one of several defendants, is not such a final decision, as gives the right of appeal to the complainant.

This must be so, especially when, as here, the demurring defendant is not a necessary party.

A final decision is one which determines all the issues between the complainants on the one hand and all the necessary defendants on the other.

The petitioner's counsel in all the moving papers refers to the order of January 10, 1900, as a final decree and complains that no appeal was ever taken from it.

It was not final, and it was not appealable. *In re Hohorst,* 148 U. S., 262; *In re Atlantic City R. R.,* 164 U. S., 633; *In re Pollitz,* 206 U. S., 323, 332; *Bostwick vs. Brinkerhoff,* 106 U. S., 3.

POINT IV.

The Metropolitan Trust Company was not a necessary party to the cause, although a proper party.

I have already pointed out that no one has claimed that it was a necessary party until the present motion, and I have given the reasons, *supra,* why it cannot be contended that it is anything more than a proper party. It is, perhaps, barely that. It was one of the general public who exchanged bonds and stock held by it for the new illegal bonds.

We cannot better state the impropriety of calling such parties who had no part in the confederacy of conspiring defendants "necessary parties" than by quoting from the brief of the counsel for

the defendants when before the Circuit Court of Appeals. After calling attention to the fact that the complainant is suing on behalf of the Wabash Railroad Company, and after stating the decree that might be entered in accordance with the prayer of the complainant's bill, counsel say:

> "Whatever effect, direct or collateral, the "rendering of such a decree would have upon "other security holders of the Wabash Rail-"road Company, is of no moment or concern "to the complainant. His rights are estab-"lished and full relief as to him secured. Any "controversy which might result or be created "as a consequence of such decree between the "Wabash Railroad Company and holders of "its other securities, is a separate and distinct "controversy, to which no party to the present "record, not even the complainant himself, "will be a necessary (or proper) party."

I believe the words I have placed in parentheses should be omitted to make the statement accurate.

The above statement of the status of the Metropolitan Trust Company and other innocent holders of the bonds, is not at all in conflict with the decision of the Circuit Court of Appeals that the other defendants (who were engaged in the conspiracy and actively taking steps towards its consummation) were necessary parties.

POINT V.

The Court may vacate a judgment, after the term has expired, during which it was entered, and its power so to do, is not dependent upon the issue of a formal writ, or the institution of an action in equity; but in a proper case relief can be obtained by service of a notice of motion.

Under this point, I do not propose to distinguish between those cases, where such a notice of motion is proper and those cases where it is not; but only to point to the fact that there is nothing inherently impossible in obtaining jurisdiction by such a notice, and that the jurisdiction of the court has frequently been exercised and upheld, without the formality of the service of a writ to bring the party who was successful in procuring the judgment into court.

Under my next point I shall endeavor to show, that the case at bar is one coming within the exception, and not within the general rule, that all such motions must be made before the close of the term during which the judgment is entered. It is sufficient here to cite the cases where this method of service has been utilized and held valid, after the expiration of the term.

I may be permitted also to suggest that the tendency of the courts is to simplify rather than to complicate practice. It would therefore seem as if that simplification of practice which began before Blackstone's time of substituting a simple notice of motion, in place of a writ, would warrant us, even if there were no precedent, in asking the court to enlarge, certainly not to limit, the cases where a notice of motion may take the place of a writ or a bill in equity.

We do not believe, however, that we are asking anything more, than that a notice of motion in the case at bar should perform its own recognized function of taking the place of a writ of error *coram vobis*.

The cases sustaining this point are all those cited under my next point and also the following: *Pickett vs. Ledgerwood*, 15 Fed. Cas., 132; s. c. 7 Pet., 142, 147; *Ferris vs. Douglass*, 20 Wend., 626; cited with approval in *Wetmore vs. Karrick*, 205 U. S., 141, 151.

POINT VI.

Whether the order of January 10, 1908, was final or interlocutory, and whether the Metropolitan Trust Company was a necessary, or only a proper party, no error was committed, by the Judge of the Circuit Court, in granting complainant's motion, to vacate that order, or decree, on the suggestion, or motion of complainant, in view of the mandate of the Circuit Court of Appeals, establishing the fact, that the diverse citizenship did not exist, which was necessary to give jurisdiction to the Court to enter the decree.

Nearly all that has been discussed and all the cases cited under the preceding point are applicable here.

The general rule is stated and recognized in Judge WARD'S opinion, that a motion to vacate a judgment must be made before the expiration of the term at which it was rendered (fol. 221).

But the exceptions to this rule are many. They include a judgment or order which is not final.

It would have been competent and proper for the court, or the defendants who entered upon the final judgment of February 23, 1909, in this case to have included the Metropolitan Trust Company in that judgment, as a proper, but not a necessary, party to the cause and to the judgment, and the Trust Company could not have objected that it had already been dismissed. It cannot now object that the court has lost jurisdiction over it.

But further:

THE ENTRY OF A VOID JUDGMENT DOES NOT DISMISS THE DEFENDANT FROM THE COURT; ONLY A VALID FINAL JUDGMENT CAN DO THAT. *City of Olney vs Harvey*, 50 Ill., 453.

MUCH LESS DOES THE ENTRY OF A VOID INTERLOCUTORY DECREE DISMISS A DEFENDANT.

But, assuming that the order of January 10, 1908, was a final judgment (although it allowed a number of defendants to answer) then it becomes necessary to consider the exceptions to the general rule.

Where a judgment is entirely void for want of jurisdiction the power to vacate it or set it aside is not limited to the term at which it was rendered, but may be exercised at any succeeding term. *U. S. vs. Wallace*, 46 Fed., 569.

See also 30 Cent. Dig. til Judgment, § 739, and Black on Judgments, § 307.

These exceptions include not only all cases which formerly could be included in the writ of error *coram vobis* (or as it is called in England and in the state courts *coram nobis, Ledgerwood vs. Pickets*, 1 McLean, 143, 144), but also many analogous ones. This has been emphatically and repeatedly held by this court, in all the cases cited by Judge WARD and upon this brief, and

especially in those cited under this and the preceding point.

The rule has been so well and concisely stated in one of the cases cited that we quote the opening paragraph in the opinion of Judge CLOPTON, in *Baker vs. Barclift*, 76 Ala., 414, 417:

> "It is a well settled principle that a Court "has no power to alter, vary or annul final "judgments, *not void*, after the expiration of "the term at which they were rendered, ex- "cept for the correction of clerical errors or "omissions, or to amend *nunc pro tunc* on the "record. It is also well settled, that when "a judgment, void for want of jurisdiction, "has been rendered, the court has the power, "and will, on a proper application, vacate such "judgment, at any time subsequent to its ren- "dition." Citing *Buchanan vs. Thomason*, 70 Ala., 401.

The ancient writ was used in cases where, like the case at bar, there was some fact which could be brought to the attention of the court by the writ, and which conclusively showed that *the court had no jurisdiction*, e. g., the death, infancy or coverture of a party, the misprison of the clerk, *"or the like."*

In the case at bar and in *Shuforth vs. Cain* 1 Abb. U. S., 302, cited by Judge WARD (fol. 222) the fact of a lack of diverse citizenship is the fact upon which the moving party relied to show lack of jurisdiction and the nullity of the judgment.

The only distinction between the cases is that in the case at bar the lack of jurisdiction of the cause has been passed upon and finally decided by the Circuit Court of Appeals, whereas in the *Shuforth* case [redacted] it had not.

This court *in re Hohorst*, 150 U. S., 653, issued a writ a mandamus to compel a circuit court to vacate an order dismissing a suit against one

of the defendants, and to resume jurisdiction over that defendant, although the order dismissing the bill was made on April 11, 1889, and the petition for the writ of mandamus was not made until May, 1893. Between these dates an appeal erroneously taken by the petitioner was dismissed, p. 664.

Thus judgment was vacated and a defendant who had been dismissed from the court was brought back without the issue of any writ against him and without any notice save a notice of motion.

This court in that case further held that the fact (if fact it was) that the defendant appeared specially to dispute the jurisdiction of the court did not alter the situation (p. 664).

In a case closely analogous to the case at bar, cited by Judge WARD in his opinion and frequently cited in the state courts (e. g., 1 Ariz., 334; 59 Md. 244; 11 R. I., 475; 58 Tex., 232) the learned court says:

> "It is insisted on the part of Shuford, that "no relief could be given in this particular "case upon a mere motion. But counsel did "not name what he deemed a proper remedy "though he seemed to indicate that a suit "*audita querela* or *scire facias* or a writ of "error *coram vobis*, might possibly answer. "The court will however leave the matter as it "stands and assume that a proceeding by mo- "tion is a suitable and also a not unusual "remedy.
>
> "*This mode of investigating questions which "are in their general features like these now "under consideration, has, in modern days "been countenanced and adopted by the "courts by reason of their being less expensive "and more simple and expeditious than these "cumberous and technically toilsome remedies "just named.*" Citing a number of federal and state court cases.

Shuforth vs Cain supra.

In that case the viciousness of a final judgment, and its consequent voidability, was shown on the moving papers to be the lack of jurisdiction. The alleged jurisdiction, as in the case at bar, grew out of an alleged diverse citizenship because the plaintiff was a citizen of one state and the maker, payee and endorser all citizens of another state. The motion was made several terms after that in which the final judgment was rendered.

I have been unable to find that this case has ever been criticised or overruled, and it has been frequently followed and cited with approval.

This court found no difficulty in the case of *Hoyt vs. Hammekin,* 14 How., 334, 346, invalidating the use of a notice of motion in lieu of a writ of error *coram vobis,* although that case did not fall within the specific defects of jurisdiction commonly named as those upon which that writ can be based.

Other cases, in addition to those already cited, which fall into the same class of cases, are: *Mills vs. Dickson,* 6 So. Car. Law Rep., 487; *Dederick's adm. vs. Richley,* 19 Wend., 108.

In one of these it was a judgment by confession, void because one partner could not confess for both.

In the other, the judgment was void because entered on a referee's report which, because the case was in tort, was unauthorized by the statute.

In the Rhode Island case, cited *infra,* there was a similar flaw in the jurisdiction.

The argument urged by the petitioner's counsel that the court cannot exercise jurisdiction after judgment did not prevail in this court in *ex parte Crenshaw,* 15 Pet., 119.

A motion there was made in the January term, 1841, to set aside a decree of this court, and although nothing was pending in this court, the cause had been concluded, the parties dismissed in the January term, 1840, and it was urged under the authority of *Lee vs. Dick,* 10 Pet., 482, that "the case has passed into judgment and is no longer before the court, or in the power of the court" this court by Chief Justice TANEY held that "since the cause was not legally before us at the "last term, the decree then pronounced must there-"fore be declared null and void and the mandate "to the circuit court must be revoked."

The case of *Wetmore vs. Karrich,* 205 U. S., 141, cited in petitioner's brief is not in point because there the motion was vacating the judgment was made and granted *ex parte.*

Another case cited by him and relied upon by us is that of *Phillips vs. Negley,* 2 Mackey (Md.) 248, S. C., 117 U. S., 665. There the cause for vacating the judgment was not the lack of jurisdiction and its consequent nullity, but "irregularity, fraud and deceit" (p. 666).

Among the cases cited by Judge WARD in addition to the leading cases in this court (*Bronson vs. Schulter,* 104 U. S., 401, and *Phillips vs. Negley,* 117 U. S., 665) and the *Shuforth* case already discussed, attention is called to the Rhode Island case (*In re College Street,* 11 R. I., 472), as presenting a state of facts showing lack of jurisdiction, but not falling within the specific cases ordinarily enumerated as subjects for a writ of error *coram vobis.*

It is urged by petitioner that our only remedy is to bring a bill in equity. This is circuitous, unnecessary, expensive, as is pointed out in the *Shuforth* case, quoted *supra.*

The bill in equity was found quite useless in an Ohio case.

There (*Critchfield vs. Porter*, 3 Ohio, 518, 522) the complainant was told that his simple, direct remedy to attack a judgment *void for lack of jurisdiction* was by motion, although the term had expired during which it was rendered, and, having that simple remedy, equity would not grant him relief.

FINALLY,

It is respectfully submitted, that the application for a writ of prohibition, and for a writ of mandamus, prayed for in the petition of the Metropolitan Trust Company, should be denied, with costs.

J. ASPINWALL HODGE,
Of Counsel for the Complainant in the cause of *Pollitz vs. Wabash Railroad Co.* and others, and designated, in the return in the above matter, to present the same, and to file such brief, and make such argument, as the court will permit.

Dated, May 10, 1910.
5 Nassau Street,
New York.

IN RE METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK.

APPLICATION FOR A WRIT OF PROHIBITION OR MANDAMUS.

No. 12. Original.—Submitted May 16, 1910.—Restored to the docket for oral argument May 31, 1910.—Argued October 11, 1910.—Decided November 14, 1910.

All parties to the record who appear to have any interest in the challenged ruling must be given an opportunity to be heard on an appeal, and the decision of the Circuit Court of Appeals reversing a decree of the Circuit Court applies only to the parties brought before that court.

After the Circuit Court has refused to remand, has tried the issues and entered judgment dismissing the complaint as to certain defendants, it cannot, after the Circuit Court of Appeals has, on an appeal to which such defendants were not made parties, reversed the order refusing to remand, vacate the judgment dismissing the complaint as to the defendants not parties after the expiration of the term at which such judgment was entered.

A decree of the Circuit Court refusing to remand a cause cannot, even if error and subsequently reversed on appeal by the Circuit Court of Appeals, be treated as a nullity; and proceedings of the Circuit Court while it retained jurisdiction as to defendants not parties to such appeal remain in full force.

A court cannot deal with a decree other than for correction of clerical error or inadvertance after the termination of the term at which it was entered.

Where the Circuit Court vacates a decree without jurisdiction and refuses to reinstate it, mandamus is the proper remedy to compel it to do so.

THIS is an application by the Metropolitan Trust Company of the city of New York, which had been impleaded as a defendant in the suit of *James Pollitz* v. *The Wabash Railroad Company*, for a writ of prohibition or mandamus directed to the Circuit Court of the United

States for the Southern District of New York, to forbid the exercise of jurisdiction over the petitioner and over a decree dated January 10, 1908, in its favor in said suit, and in the alternative to provide that any order for the vacating of said decree should be set aside. A rule to show cause was issued, to which return has been made, and from the petition and return the following facts appear:

On or about January 15, 1907, James Pollitz brought suit in the Supreme Court of the State of New York against the Wabash Railroad Company and others to declare illegal and void certain securities of the Railroad Company issued in exchange for debenture bonds pursuant to a plan complained of as injurious to the stockholders, and for a reëxchange, and in default thereof for an accounting by the defendants with respect to the new securities which had been issued.

On January 25, 1907, the Railroad Company caused the case to be removed to the Circuit Court of the United States for the Southern District of New York on the ground that there was a separable controversy between it as a citizen of the State of Ohio and the complainant, a citizen of the State of New York.

The complainant moved to remand the cause, and on February 21, 1907, the motion was denied. Thereupon application was made to this court for a writ of mandamus to compel the remand and the petition was denied. *In re James Pollitz*, 206 U. S. 323.

After the removal of the cause the defendants demurred to the bill of complaint, the Trust Company demurring separately, and all the demurrers were overruled, save that of the Trust Company which was sustained. A decree was entered on January 10, 1908, which, after overruling the other demurrers, provided as follows:

"Ordered, adjudged and decreed, that the demurrer of the defendant the Metropolitan Trust Company of the

City of New York, be, and the same hereby is, sustained, and that the bill of complaint be, and the same hereby is dismissed as to the defendant the Metropolitan Trust Company of the City of New York, with costs."

The defendants other than the Trust Company then answered. An earlier suit, to which the Trust Company was not a party, was pending in the same court, with regard to the same transaction, and the court denying the motion of the complainant for leave to discontinue the first suit ordered the suits to be consolidated. After hearing a final decree was entered on February 23, 1909, dismissing the bill in each suit upon the merits.

The complainant then appealed to the Circuit Court of Appeals, but no review was sought of the decree of January 10, 1908, dismissing the bill in the second suit as against the Trust Company; and the Trust Company was not cited and did not in any way become a party to the appeal.

On February 18, 1910, the Circuit Court of Appeals decided that there was not a separable controversy between the complainant and the Railroad Company, and that the motion to remand should have been granted. The court accordingly reversed the final decree with direction to the Circuit Court to permit the complainant to discontinue the first cause and to remand the second cause to the Supreme Court of the State of New York.

Thereupon, on February 28, 1910, an order for remand was entered in the Circuit Court, which contained the following provision as to the Trust Company:

"And it appearing that the defendant Metropolitan Trust Company duly demurred to the complaint and that such demurrer was sustained and judgment entered January 10, 1908, dismissing the complaint as to said defendant which has not been appealed from or reversed,

"Ordered, adjudged and decreed that this judgment remanding said cause to the Supreme Court of the State

of New York shall not apply to said defendant Metropolitan Trust Company."

On March 21, 1910, the complainant moved in the Circuit Court to vacate the decree entered January 10, 1908, and to remand the cause as to the Trust Company. The latter appeared specially and objected to the jurisdiction of the court. The court granted the motion to vacate the decree and denied the motion to remand the cause as to the Trust Company, without prejudice, upon the ground that the application for such relief should be made to the judge who entered the order to remand as to the other defendants.

The Trust Company then applied to this court for a writ of prohibition or mandamus, as stated.

Mr. Tompkins McIlvaine, with whom *Mr. Henry B. Closson* was on the brief, for petitioner:

On the face of the record the Circuit Court was without power or jurisdiction to enter any order affecting the rights of petitioner under the final judgment after the term at which said judgment was rendered had expired. *Bronson* v. *Schulten*, 104 U. S. 410; Rolle's Abridgment, p. 749. See also *Cameron* v. *McRoberts*, 3 Wheat. 590; *Phillips* v. *Negley*, 117 U. S. 665; *Wetmore* v. *Karrick*, 205 U. S. 141.

Whether the Circuit Court has any inherent power to at any time vacate a judgment for want of jurisdiction to enter it is immaterial in this case, since it appears on the face of the record that diversity of citizenship existed between the plaintiff and the removing defendant, who asserted that a separable, removable controversy existed between them. The determination of whether such controversy existed was a justiciable question to be decided by the Circuit Court. The Circuit Court, in the exercise of its proper jurisdiction, did determine that such a controversy existed, which determination, being

unmodified and unreversed, as against the petitioner, is binding and conclusive as to it and cannot be treated as a nullity. *In re Winn*, 213 U. S. 458, distinguishing *Ex parte Nebraska*, 209 U. S. 436; *Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207. See also *Skillern's Executors* v. *May's Executors*, 6 Cr. 266; *McCormick* v. *Sullivan*, 10 Wheat. 192; *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 123 U. S. 552; *Dowell* v. *Applegate*, 152 U. S. 327; *Re Pollitz*, 206 U. S. 323.

Where plainly and on the face of the record the Circuit Court is assuming to act beyond its power and jurisdiction, prohibition or mandamus is an appropriate remedy for one who has objected to the jurisdiction improperly assumed to be exercised. As to prohibition see *In re Huguley Mfg. Co.*, 184 U. S. 297, 301; *Smith* v. *Whitney*, 116 U. S. 167; *In re Rice*, 155 U. S. 396; *In re Chetwood*, 165 U. S. 443; *Ex parte Joins*, 191 U. S. 93. As to mandamus see *Re Winn*, 213 U. S. 458; *Ex parte Bradley*, 7 Wall. 364; *Virginia* v. *Rives*, 100 U. S. 313; *Virginia* v. *Paul*, 148 U. S. 107; *Kentucky* v. *Powers*, 201 U. S. 1; *Ex parte Wisner*, 203 U. S. 449; *Re Metropolitan Ry. Receivership*, 208 U. S. 90; *Matter of Dunn*, 212 U. S. 374.

Mr. J. Aspinwall Hodge, appearing by appointment of Judge Ward, United States Circuit Judge, in opposition to the applications:

This court has no power to issue a writ of prohibition, in any case, except where the court below is proceeding as a Court of Admiralty.

The writ never includes the prohibition of an act already completed. *Ex parte Christy*, 3 How. 292; *Ex parte Easton*, 95 U. S. 68, 72.

The writ of mandamus cannot be used to compel the Circuit Court to take jurisdiction of a cause which it has decided, through its Court of Appeals, it has no

jurisdiction to consider, owing to a failure to show diverse citizenship between the necessary parties.

The conclusion of the Circuit Court that the cause should be remanded is not reviewable here by appeal or writ of error or by mandamus. *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Missouri Pac. R. R.* v. *Fitzgerald*, 160 U. S. 556, 581.

A motion in the nature of a writ of error *coram vobis* "is the exercise of jurisdiction in the court below which does not admit of revision in this tribunal." *Legerwood* v. *Picket*, 15 Fed. Cas. 132; *S. C.*, 1 McLean, 143; *S. C.*, 7 Pet. 144, 148.

The writ of mandamus cannot perform the office of a writ of error. *In re Rice*, 155 U. S. 396, 403, citing *American Construction Co.* v. *Jacksonville Ry. Co.*, 148 U. S. 372, 379; *Ex parte Loring*, 94 U. S. 418; and see *Ex parte Newman*, 14 Wall. 152.

An order or decree sustaining the demurrer of one of several defendants, is not such a final decision as gives the right of appeal to the complainant. *In re Hohorst*, 148 U. S. 262; *In re Atlantic City R. R.*, 164 U. S. 633; *In re Pollitz*, 206 U. S. 323, 332; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3.

The Metropolitan Trust Company was not a necessary party to the cause, although a proper party.

The court may vacate a judgment, after the term has expired during which it was entered, and its power so to do is not dependent upon the issue of a formal writ, or the institution of an action in equity; but in a proper case relief can be obtained by service of a notice of motion. *Pickett* v. *Legerwood*, 15 Fed. Cas. 132; *S. C.*, 7 Pet. 142, 147; *Ferris* v. *Douglass*, 20 Wend. 626; cited with approval in *Wetmore* v. *Karrick*, 205 U. S. 141, 151.

Whether the order of January 10, 1908, was final or interlocutory, and whether the Trust Company was a necessary, or only a proper, party, no error was committed,

by the Judge of the Circuit Court, in granting complainant's motion to vacate that order, or decree, on the suggestion or motion of complainant, in view of the mandate of the Circuit Court of Appeals establishing the fact that the diverse citizenship did not exist, which was necessary to give jurisdiction to the court to enter the decree.

The entry of a void judgment does not dismiss the defendant from the court; only a valid final judgment can do that. *City of Olney* v. *Harvey*, 50 Illinois, 453. Much less does the entry of a void interlocutory decree dismiss a defendant. *United States* v. *Wallace*, 46 Fed. Rep. 569; see also 30 Cent. Dig., title Judgment, § 739, and Black on Judgments, § 307; *Baker* v. *Barclift*, 76 Alabama, 414, 417; *Shuforth* v. *Cain*, 1 Abb. U. S. 302; *Re Hohorst*, 150 U. S. 653.

See *Hoyt* v. *Hammekin*, 14 How. 334, 346, invalidating the use of a notice of motion in lieu of a writ of error *coram vobis*. *Mills* v. *Dickson*, 6 So. Car. Law Rep. 487; *Dederick* v. *Richley*, 19 Wend. 108; *Ex parte Crenshaw*, 15 Pet. 119; *Lee* v. *Dick*, 10 Pet. 482; *Wetmore* v. *Karrick*, 205 U. S. 141; *Phillips* v. *Negley*, 2 Mackey (D. C.), 248; *S. C.*, 117 U. S. 665, distinguished, and see also *Bronson* v. *Schulten*, 104 U. S. 401; *Phillips* v. *Negley*, 117 U. S. 665; *In re College Street*, 11 R. I. 472; *Critchfield* v. *Porter*, 3 Ohio, 518, 522.

MR. JUSTICE HUGHES, after making the foregoing statement, delivered the opinion of the court.

When the complainant moved to remand the cause the Circuit Court had jurisdiction to determine whether or not a separable controversy existed which justified the removal from the state court. Its decision was an act within its judicial authority, subject to review upon appeal after final decree. On the application made to

this court in *In re Pollitz*, 206 U. S. 323, for a writ of mandamus to compel the remand, the court said (pages 331, 333):

"The issue on the motion to remand was whether such determination could be had without the presence of defendants other than the Wabash Railroad Company, and this was judicially determined by the Circuit Court, to which the decision was by law committed.

"The application to this court is for the issue of the writ of mandamus directing the Circuit Court to reverse its decision, although in its nature a judicial act, and within the scope of its jurisdiction and discretion.

"But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error.

* * * * * * * *

"If the ruling of the Circuit Court was erroneous, as is contended, but which we do not intimate, it may be reviewed after final decree on appeal or error. *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556, 582." See, also, *Ex parte Nebraska*, 209 U. S. 436; *In re Winn*, 213 U. S. 458, 468; *Chesapeake & Ohio Railway Co.* v. *McCabe, Admx.*, 213 U. S. 207.

Having decided to retain the cause, the Circuit Court proceeded, as it was entitled to proceed, to try the issues. It heard the demurrers to the bill and overruling the others it sustained that of the Metropolitan Trust Company. No leave was granted to amend the bill and a decree was entered dismissing it as against the Trust Company. When, after final decree dismissing the bill as against the other defendants, the complainant appealed to the Circuit Court of Appeals, the decree in favor of the Trust Company was not brought before the appellate

court for review and the Trust Company was not a party to the appeal.

The decision of the Circuit Court of Appeals, in reversing the final decree and in directing the remand to the state court, was of course subject to the necessary limitation that it could apply only to the parties who had been brought before that court. It had no other purport. It is one of "the ordinary rules respecting appeals" that "all the parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal." *Davis* v. *Mercantile Trust Co.*, 152 U. S. 590, 593. See also *Terry* v. *Abraham*, 93 U. S. 38; *Wilson* v. *Kiesel*, 164 U. S. 248, 251. If a party has not had this opportunity he is not bound; as to him an essential element of appellate jurisdiction is lacking. Accordingly, when the decree was entered in the court below upon the mandate of the Circuit Court of Appeals, the Trust Company was expressly excepted from its operation.

It is in this light that the subsequent proceeding in the Circuit Court must be examined. If that court had jurisdiction to vacate the decree of January 10, 1908, in favor of the Trust Company, it was by virtue of its own control over the decree and not by force of the mandate of the appellate court. Nor could the court exercise the general power which it possesses to modify or set aside its orders or decrees prior to the expiration of the term at which the final decree is entered; for in this case that term had ended before the motion was made. *Cameron* v. *M'Roberts*, 3 Wheat. 591; *Ex parte Sibbald* v. *United States*, 12 Pet. 488; *Bronson* v. *Schulten*, 104 U. S. 410, 415; *Ayres* v. *Wiswall*, 112 U. S. 187, 190; *Phillips* v. *Negley*, 117 U. S. 665, 674. The motion was not made for the purpose of correcting a clerical error or an inadvertence. After the term had expired, and after the complainant had exercised his right of appeal to procure a review of the errors of which he

desired to complain, it was sought to set aside a decree which stood unreversed and by which the Trust Company had been dismissed from the cause.

To reach this result the Circuit Court asserted the power to vacate the decree upon the ground that it had been rendered without jurisdiction; and the court held that it must be treated as a nullity. But the decree cannot be so regarded unless the court, upon the motion to remand, was without jurisdiction to determine whether a separable controversy existed, and hence not merely committed error but exceeded its authority. The decree was not a nullity unless the order refusing to remand was a nullity; and the latter contention was negatived by the decision of this court upon the application for a writ of mandamus in *In re Pollitz*, *supra*. The reversal by the Circuit Court of Appeals of the final decree as to the other defendants, and its direction to remand, did not make the decision of the court of first instance any the less "a judicial act, and within the scope of its jurisdiction and discretion;" and as that reversal and direction did not affect the Trust Company the decree in its favor remained in full force.

The question is not with respect to the mere form of the application which was made to the Circuit Court for the purpose of setting the decree aside. When the motion was made the court was without jurisdiction to vacate the decree. As the court, in granting the motion, exceeded its power, mandamus is the appropriate remedy. *Ex parte Bradley*, 7 Wall. 364; *In re Winn*, 213 U. S. 458.

The rule is made absolute and the writ of mandamus awarded.